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**In The
United States Circuit Court of
Appeals** 1111

FOR THE NINTH CIRCUIT,

May Session, 1918.

Koke Co. of America,
Southern Koke Co., Ltd.,
Koke Co. of Texas,
Koke Co. of Arkansas,
Koke Co. of Oklahoma,
Defendants-Appellants

vs.

The Coca-Cola Co.,
Plaintiff-Appellee.

No. 3012

**Appeal from the
United States
District Court
for the District
of Arizona.**

**Schedules of Fact on Behalf of Defendants-
Appellants.**

RICHARD E. SLOAN,
AUGUSTINE B. LITTLETON,
Attorneys for Defendants-
Appellants.

FILED

OCT 4 - 1918

F. O. MONKTON,

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Under the pleadings, it was incumbent upon plaintiff to establish, by clear and convincing evidence, such facts as would support the conclusion that defendants are representing their goods to be of plaintiff's manufacture,—not, indeed, by direct representations to dealers, but by indirect representations made to the general public by means of the color and taste of their product, the “get-up” of their packages, and the words used on their crowns and labels as names for their goods. To provide a basis for such a conclusion, it was incumbent upon plaintiff to show clearly and convincingly that this color, taste, and “get-up,” and that these names, indicate to the general public the origin or manufacture of the goods and amount to a representation that plaintiff is their maker. Such facts plaintiff has completely failed to establish.

Plaintiff has shown, without dispute, that its goods and defendants' goods have the same color and taste, but it has not established, and has not produced any evidence tending to establish, that this color and taste have any significance whatever to the general public as indicative of the origin or manufacture of the goods.

Plaintiff has shown, without dispute, that some of the several varieties of packages used by it and by defendants have certain features in common, but it has not established, and has not produced any evidence tending to establish, that these common features signify anything whatever to the general public regarding the origin or manufacture of the goods contained in the packages having those features.

Plaintiff has shown, without dispute, that defendants are using the words "Koke" and "Dope" on their crowns and labels as names for their goods, but it has not established, and has not even attempted to establish, that the presence of these words on defendants' crowns and labels ever has caused, or is likely ever to cause, anyone to mistake defendants' goods for those of plaintiff's manufacture.

Plaintiff has shown, without dispute, that the public generally use and employ numerous expressions, such as "coke," "dope," "shot," "eye-opener," "sniff," "needle," "hop," "slow-dope," etc., to indicate to soda dispensers the kind of drink they want, but it has not established, and has not produced any evidence tending to establish, that the general public use these various expressions, or any of them, to indicate the origin or manufacture of the goods thus asked for.

Plaintiff has completely failed, therefore, to establish any facts from which the conclusion could be drawn that defendants are making any misrepresentations to the general public as to the true origin of their goods, or that they are placing in the hands of retailers an "instrument of fraud." Nothing else plaintiff may have shown can possibly affect the decree that must be entered. Unless these facts be proven, there is no room for a charge of fraud or unfair competition.

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer, or vendor, for the goods of another, and if de-

fendant so conducts its business as not to palm off its goods for those of complainants, the action fails."—*Howe Scale Co. v. Wyckoff, Seams & Benedict*, 198 U. S. 118, 140.

Not only has plaintiff failed to show any title to relief, but the testimony overwhelmingly establishes the entire absence of any such right.

It is overwhelmingly established, without dispute, and admitted, that numerous soda water beverages having precisely the same color as plaintiff's product were in the market fifty years or more before plaintiff's product was even dreamed of; that numerous soft drinks having precisely the same color and taste have been on the market ever since plaintiff's product was first placed on sale; that defendants and their predecessors have continuously manufactured and marketed beverages having precisely the same color and taste ever since 1888; and that at the time the bill was filed in this cause almost "innumerable" beverages of the same color and taste were literally flooding the market; and hence that no one in his right mind would ever be fool enough to think he could tell whose manufacture a drink of this kind was simply by its color or taste.

It is overwhelmingly established, without dispute, and admitted, that barrels painted the same shade of red as plaintiff's barrels have been in universal use since time immemorial for all kinds and flavors of soda water syrups and extracts, and particularly for the "innumer-

able" different brands of cola drinks; that the color and shade of paint plaintiff uses on its barrels is, and has been for years, in general use for painting all kinds of cooperage; and that, as a consequence, no one with ordinary intelligence would be so foolhardy as to even venture a guess as to whose manufacture of soda water a barrel might contain merely because the barrel was painted that color; or, indeed, as to what kind, or flavor, of soda water it might contain, or as to whether or not it contained soda water syrup at all.

It is overwhelmingly established, without dispute, and admitted, that soda water bottles exactly like plaintiff's in size, color, shape, design, and general appearance, have been in universal use for all kinds and flavors of soda water since time out of mind, and certainly long before the aerated beverage made from plaintiff's syrup was ever marketed in bottles; that nearly all the "innumerable" brands of cola drinks are marketed in bottles of precisely that same kind; that plaintiff's own bottlers market numerous other soda water flavors of the same color as plaintiff's product in bottles not only substantially indistinguishable from the bottles they use for the beverage made from plaintiff's syrup, but in many cases in identically the same bottles; and hence that no one but a fool would hazard a wager as to whose manufacture of soda water a bottle might contain merely because it was a bottle having those features, or even as to what kind, or flavor, of soda water such a bottle might contain.

It is overwhelmingly established, without dispute, that dispensing bottles like those plaintiff furnishes to its dealers are made by machinery, in immense quantities, for general distribution, and are the only design so made; that they are used generally in the trade as receptacles for all the different brands and flavors of soda fountain syrups; and that, in consequence, no one who had ever patronized a soda fountain before would undertake to decide as to the manufacture of the syrup displayed in such a dispensing bottle merely from the size, color, shape, design, or general appearance thereof, or even as to the particular kind or flavor of syrup therein exhibited.

It is overwhelmingly established, without dispute, and admitted, that crowns having the same color, design, and style of lettering as those used on the bottles containing the aerated beverage made from plaintiff's syrup have been in general use, not only on the bottles containing the different kinds of flavors of soda water, and on the bottles containing the "innumerable" other brands of cola drinks, but even on bottles containing beer and other kinds of beverages,—notably "Budweiser" beer,—ever since decorated crowns first came into use; and hence that nobody would ever think of looking to the color, design, or style of lettering on the crown of a bottle to determine whose manufacture of soda water such bottle might contain,—or even the kind of drink contained therein.

It is overwhelmingly established, without dispute, that

none of the several kinds of labels used on the various different types of receptacles for defendants' product bears any sort of deceptive resemblance to any of the several kinds of labels used on the various different types of receptacles for plaintiff's product. The only basis for the charge that defendants have imitated plaintiff's labels is the fact that for a short period in 1913 a bottler in Dallas, Texas, and another in New Orleans, La., used a label on their bottles containing the aerated beverage made from defendants' syrup which resembled in size, color, shape, and in the wording around the periphery, the label then used by some of plaintiff's bottlers on the bottles containing the aerated beverage made from plaintiff's syrup. This label differed from plaintiff's label in its most prominent features,—namely, in the name of the product conspicuously displayed in the centre thereof ("Koke"), in the statement around the periphery as to the company under whose authority the stuff was bottled, (the "Koke Company of Texas" in one case, and the "Southern Koke Co., Ltd.", in the other), and in the signature of the president of the company ("W. McCarty Moore.") It was not shown that plaintiff's label was in any way distinctive. On the other hand, it was admitted that plaintiff had only been using that particular design of label since 1907, having previously used a red label instead. It was shown that labels of that shape are in general use, and that it is customary to print around the periphery the statement that the article is bottled under the authority of the manufacturer. The use of the label complained of was voluntarily discontinued by both the bottlers referred

to, at the suggestion of defendants, many months before this suit was brought, and a yellow and red label, which could not possibly be mistaken for any of plaintiff's labels, was adopted and has since been used in its stead. It was readily admitted that the former label had never in fact misled anyone, and, as its use has been wholly discontinued, there is no probability that it ever will.

It is frankly conceded that the use of the words "Koke" and "Dope" on defendants' crowns and labels has never misled, and is not likely ever to mislead, anyone into supposing that defendants' goods are plaintiff's goods, and it is overwhelmingly established, and admitted, that the slang expressions "coke," "dope," "shot," etc., are used by the public merely to describe generically the character of commodity desired, and not in any wise to designate any particular manufacture of that commodity; and hence that the sale of defendants' goods, or anybody else's goods, in response to requests for that sort of article by any of these expressions, could not constitute a sale thereof as and for plaintiff's manufacture, but only as and for the kind of stuff it actually is. All of plaintiff's "trade" witnesses readily admit either that these expressions are used simply to indicate the kind of drink that is wanted, without reference to its manufacture, or else that they are not in a position to know whether or not these expressions are so used by the public generally. None of them pretend to assert that they are not so used.

These admitted facts, coupled with the complete break-down of the attempt to show that defendants had

encouraged retailers to sell their goods as plaintiff's goods, and the utter collapse of the efforts to prove a fraudulent intent on the part of defendants, or actual substitution of their goods for plaintiff's, clearly evince the want of any foundation for this proceeding, and bring into strong relief the admitted fact that the purpose of this suit is not to prevent *unfair* competition, but *any* competition.

Under these circumstances it is not surprising to find plaintiff craftily trying to divert attention from the insufficiency and failure of its proof by all sorts of artful evasions, adroit sophistries, covert assumptions, reckless misstatements, aimless mud-slinging, and general "camouflage."

For instance, we find plaintiff trying to evade the issue by vigorously attacking the testimony [now no longer of any consequence since the drastic amendments to the bill (Rec., 113)] with respect to the time when defendants' predecessors first adopted and began to use the word "Koke" as a name for their product, and devoting practically its entire brief to a carefully inaccurate and purposely misleading distortion of that testimony, and a wholesale slinging of mud, just as though it could in any wise affect the result in this case whether defendants' predecessors adopted and began to use the word "Koke" in 1888 or in 1909. A finding either way would not entitle plaintiff to the relief it seeks,—it would not cure plaintiff's failure to establish that the color and taste of defendants' product, the "get-up" of their pack-

ages, and the use by them of the words "Koke" and "Dope" as names for their product, in any wise misrepresent the true origin or manufacture of their goods to plaintiff's damage, nor would it cure plaintiff's failure to prove that the sale of any goods other than those of its manufacture, in response to requests for "coke," "dope," "shot," etc., constitute a sale of such goods as its goods.

We find plaintiff seeking to draw the unwarranted conclusion that defendants are misrepresenting the origin of their goods, to its damage, and placing in the hands of retailers an "instrument of fraud," from the wholly insufficient premise that certain features of their goods and packages, which are old in the art and common to the trade and could not possibly misrepresent the maker of the goods because they have no sort of reference to origin or manufacture, are also possessed by plaintiff's goods, and that defendants' packages are labeled and branded with names not only having no deceptive resemblance to the name branded upon plaintiff's packages, but strikingly dissimilar thereto and readily distinguishable therefrom.

We find plaintiff seeking to draw the unwarranted conclusion that defendants' goods have been passed off by retail dealers as its goods, and that defendants have encouraged this practice, from the wholly insufficient premise that defendants' goods have been sold by retail dealers when that sort of drink was asked for by slang expressions indicating nothing more than that a drink

of that kind was wanted, and that defendants have advised dealers that they had a perfect right to sell their goods under those circumstances.

These are typical illustrations of the familiar fallacy so well expressed by the phrase "non sequitur."

We find plaintiff, when confronted with the entire absence of any sufficient proof to sustain its case, passing swiftly over this minor detail with the airy assumption that unfair competition and "fraudulent trade practices" on the part of defendants have been "conclusively proved," "not even denied," and, indeed, "admitted," and then dwelling at length upon the consequences of the wrong thus covertly assumed to have been perpetrated, and vehemently denouncing that wholly imaginary wrong with a bewildering array of extravagant phrases designed to make up by way of assertion for what is lacking by way of proof.

This form of evasion is frequently met with in cases of this kind, and is such an old trick that none but the most unsophisticated could be justly expected to be ensnared by it.

To distract attention from the frantic way in which it has jumped about from pillar to post, asserting in one breath what is denied in the next, plaintiff accuses defendants of shifting positions and interposing inconsistent defenses. (Plaintiff's original brief, p. 51; supplemental brief, p. 16). But the only shift in position defendants have made has been such as was necessary to

meet the new theory of the case as presented by plaintiff's amendments to its bill (Rec., 113), or else to keep pace with the kaleidoscopic shiftings of position, without regard to consistency or candor, in which plaintiff has proven so resourceful.

In one breath plaintiff asserts that the words "Coca-Cola" are not a description of its product, but an arbitrary name, and hence a good trade-mark (supplemental brief, p. 12), and, in the next, that they are not only a description, but a truthful description, of its product, and hence not a deceptive mark (supplemental brief, p. 14).

In one breath, to avoid the charge that it did not have the exclusive use of either the word "Coca" or the word "Cola" during any portion of the ten years next preceding the passage of the Trade-Mark Act of 1905, plaintiff asserts that its alleged trade-mark does not consist of either of those words considered separately, but only in the specific combination "Coca-Cola" (supplemental brief, p. 25); and, in the next breath, to provide a ground of complaint the use by defendants of the word "Koke," it asserts that defendants have appropriated a word to which it has the exclusive right, because the sound of "Koke" is somewhat similar to the sound of the first syllable of the single word "Coca." (Supplemental brief, pp. 27 and 28).

In one breath plaintiff criticises defendants for wasting time in pointing out the fact that the words "Koke"

and "Dope" do not and cannot infringe the words "Coca-Cola" as a trade-mark (Supplemental brief, p. 27), asserting that this proposition is now of only academic interest in view of the amendments to the bill striking out all charges to the effect that these words infringe the words "Coca-Cola"; and, in the next breath, it not only asserts that the words "Koke" and "Dope" do infringe the words "Coca-Cola," (Supplemental brief, p. 28), but recklessly asserts that the fact of infringement has been finally and conclusively adjudicated between the parties and is now *res adjudicata* (supplemental brief, p. 8, et seq.). The question may or may not be *res adjudicata*, but if *res adjudicata*, the fact that has been adjudicated and set at rest is not that the words "Koke" and "Dope" infringe the words "Coca-Cola," but that they do *not* infringe them.

The Examiner of Interferences held that,—

"The opposer (the Coca-Cola Co.) has not established by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has ever been misled as a result of any deceptive similarity or resemblance between the marks 'Coca-Cola' and 'Koke' into a purchase of applicant's (the Koke Company of America's) goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark 'Koke' bears to the mark 'Coca-Cola.'"

This is the decision which was affirmed by the Commissioner of Patents and which is now asserted to be *res adjudicata*. The same conclusion was reached in *Coca-Cola Co. v. Branham*, 216 Federal, 264, in which case the decree was final, plaintiff's appeal having been dismissed. (See Defendants' Exhibits 272, 273).

The assertion is made that "it cannot be important *why* the public has given these nicknames ["coke," "dope," "shot," etc.,] to 'Coca-Cola;' the fact is that the public has done so, and defendants are knowingly and unfairly taking advantage of this fact." (Supplemental brief, p. 36). This is just another attempted evasion. The one vital, controlling question in this case is *why*, and *for what purpose*, the public use these expressions. if they use them to designate *origin* or *manufacture*, and to point out *plaintiff's* manufacture specifically, plaintiff wins; if they do not, but, instead, use them, as they actually do, simply to indicate the *kind* of drink they want, by referring to the ingredients or effects peculiar to that kind of beverage, plaintiff loses. The Commissioner of Patents held, in the case which plaintiff asserts is now *res adjudicata*, that defendants were not entitled to register the word "Koke" as a trade-mark,—not because it was a distinctive designation of origin applied exclusively to plaintiff's manufacture,—but because it was a "popular psuedonym" for the class of goods which defendants sell. (See, also, *Coca-Cola Co. v. Branham*, *supra*.)

Plaintiff asserts with a reckless indifference to fact that "there is neither a statute nor any principle of the common law which would make misbranding or adulter-

ation, or even a clear, conclusive, and final adjudication between the United States and the Coca-Cola Co. of technical misbranding, an obstacle to the protection of established trade and property rights in the word 'Coca-Cola.' ” (Supplemental brief, p. 20).

The common law of both England and the United States has for more than a hundred years made the use by a plaintiff of deceptive and misleading trade-marks or trade-names a complete bar to any protection whatever for a business which has grown out of, and is being carried on by means of, such fraud and deceit (See Appellants' brief, pp. 51 et seq.); and Section 21 of the Trade-Mark Act of 1905 expressly provides:

“That no action or suit shall be commenced under the provisions of this Act in any case where the trade-mark is used in unlawful business, or upon an article injurious in itself, or which mark has been used with the design of deceiving the public in the purchase of merchandise,” etc.

It is not true that the decree entered in the case of the *United States v. Forty Barrels, etc., of Coca-Cola*, 241 U. S., 265, provided that it should not be *adversely employed* in any other litigation in which the Coca-Cola Co. was interested. It simply provided that “the *judgment of forfeiture* shall not be *binding* upon the claimant or its product as it shall relate to any other case or proceeding.” The decree did not purport to relieve plaintiff from any inference of guilt which might be drawn from the fact that it *changed its formula*,—or, as the decree

expressed it, "made certain modifications in its process of manufacture,"—in order to escape the humiliation of the judgment of guilt which would undoubtedly have been entered if the case had again been brought to trial, and to escape other prosecutions for misbranding and adulteration which would certainly have followed if plaintiff had not changed its formula.

Plaintiff insinuates that the interlocutory, *pro forma*, decree entered by Judge Foster in the case of *Coca-Cola Co. v. Southern Koke Co. Ltd., et al.*, in the District Court at New Orleans, was an independent adjudication upon the facts, and that that decree is now a final decree and that the questions therein adjudicated are now *res adjudicata*. Nothing could be further from the truth. Judge Foster filed no written opinion, but he stated orally from the bench that, although the case had been elaborately presented, he was of the opinion that all questions therein should be treated,—for the time being, at least,—as *res adjudicata*, in view of Judge Sawtelle's decree in the case at bar, and that he had therefore concluded to enter the same decree as Judge Sawtelle had entered, awarding a reference so the decree would remain interlocutory and under his control until this court had had a reasonable time to act upon this appeal. The assertion that the time for appealing from this interlocutory decree has elapsed displays a shocking misconception of the law governing appeals.

In *Nashville Syrup Co. v. Coca-Cola Co.*, 215 Federal, 534 (C. C. A.-6), it was said:

“The interlocutory decree awarding an injunction and making a reference to take an account of damages was entered July 29th, 1912. The master’s report was filed October 8th; defendant excepted, and the final order of the court on the exceptions was dated November 25th. This order made no reference in terms to the order of July 29th, and was, in terms, confined to the sustaining of one exception, the overruling of another, an adjudication that plaintiff had failed to establish any damages, and a disposition of the costs. * * * Clearly the decree of July 29th did not become final until November 25th. This last order might well have repeated, in terms or by reference, the provisions of the order of July 29th, so that there would have been one complete, final decree, and we think this would have been according to the most careful practice; but the order of November 25th necessarily has this effect, and operates to redeclare the adjudications which, up to that time, had been interlocutory and within the control of the court, and which then, for the first time, became final. The defendant then had six months within which to appeal from any part of this consolidated final decree. Loveland’s Appellate Jurisdiction, 467, 468; *Grant Co. v. Laird Co.*, 212 U. S., 445, 29 Dup. Ct., 332, 53 L. Ed., 591.”

SCHEDULE I.

Defendant's Chain of Title to "Koke."

On Sunday, October 2nd, 1887, Dr. J. S. Pemberton, of Atlanta, Ga., who was then operating the Pemberton Chemical Co., at 107 Marietta St., Atlanta, and manufacturing "Pemberton's French Wine Coca," "Globe Flower Cough Syrup," "Indian Queen Hair Dye," "Coca-Cola Syrup," "Gingerine," "Compound Extract of Styllingia," and other preparations, placed an advertisement in the Atlanta "Constitution" reading as follows: (Rec., 1278)

"Wanted: An acceptable party with \$2,000 to purchase a one-half interest in a very profitable and well-established manufacturing business. Absolutely no risk. Guaranteed a 50 per cent. profit on investment, with possibilities of much larger profits. A rare opportunity to right party. A full investigation solicited. For particulars, address, with your name, 'Busines,' 8½ Marietta Street, Atlanta."

A photograph of page 13 of the Atlanta "Constitution" of Sunday, Oct. 2nd, 1887, showing this advertisement, and duly authenticated by the custodian of the Congressional Library at Washington, is in evidence as *Defendant's Exhibit 13*.

A. O. MURPHY, of Barnesville, Ga. (Rec., 1277-8):

"I knew of J. S. Pemberton, of Atlanta, Ga. I first met him in 1887. My first introduction to him

was through an advertisement that he had in the Atlanta 'Constitution' in something like, I think, October, 1887. * * * When I saw that advertisement I wrote to that address there,—got in correspondence with him. I suppose we passed something like a half dozen letters."

Defendants' Exhibits 14 to 20, inclusive, are the original letters written by Dr. Pemberton to A. O. Murphy. The first one, dated October 4th, 1887 (*Exhibit 11*), begins as follows:

"Atlanta, Ga., Oct. 4th, 1887.

"A. O. Murphy, Esq.,
"Barnesville, Ga.

"Dear Sir:—

"In reply to yours of the 3rd. inst. addressed to 'Business' in answer to card which I had insterted in last Sunday's Constitution, beg to inform you that the business which I desire some energetic & good party to join me and take an interest is that of manufacturing a line of medicines which I began to make & introduce about 3 years ago," etc.

A. O. MURPHY (Rec., 1279):

"When I first came to Atlanta I found Dr. Pemberton doing business down on Marietta St., I have forgotten the number. He had an office in front, a laboratory in the back, and in the basement he was making 'Wine of Coca,' 'Coca-Cola,' a cough syrup of some description, and I think perhaps a hair dye,

and a preparation of some kind made from ginger, called 'Gingerine,' something like that, I think that was the list. * * * There was nobody with Dr. Pemberton at that time, associated with him in business, that I knew of. He was making these preparations in a small way only when we came there. 'The first time I ever visited him he carried me back in his manufactory where he manufactured a bit in a small way. (Rec., 1279-80). * * * In December, 1887, I finally moved to Atlanta, and, with Mr. Mayfield and Mr. Bloodworth, who was another townsman of mine, formed a partnership with Dr. Pemberton under the name of Pemberton Medicine Co. (Rec., 1279). * * * My first correspondence was between Dr. Pemberton and myself. Afterwards I drew into it my friend, Mr. Bloodworth,—E. H. Bloodworth,—who was of our town, and, also, a partner at that time, and, after we arrived in Atlanta, before we consummated the trade, we met Mr. Mayfield,—J. C. Mayfield,—from Alabama, who had also been in correspondence with him in reply to that advertisement in the 'Constitution,' so, after a conference between Mayfield, Bloodworth and myself, he came into the deal and we formed the partnership. All four,—Pemberton, Bloodworth, Mayfield and myself,—had equal partnership. We each of us three were to pay \$2,000 cash into the concern, and Pemberton was to have an equal interest and put up his laboratory, office fixtures, and formulas, business, good-will, and one thing and another, as an off-set for the \$2,000 each one of us put up. 'The formula for 'Coca-Cola' was included in that transaction. I drew up the partnership contract,—what you might call a business agreement,—stating the terms of the partnership. * * * It occurs to me I drew it up under the direction of Judge Simmons, my father-in-law,—Judge

T. J. Simmons,—he was living with me at the time.”

J. C. MAYFIELD (Rec., 1586 and 1604):

“In 1887 an uncle of mine had formerly been in business, and we sold out in Rock Mills, Ala., and we had a little money,—his name was Randall. Mr. Randall noticed an advertisement in the Sunday’s ‘Constitution’ where the ad. wanted a partner to join in a manufacturing business (1586). * * * *Defendants’ Exhibit 13*, being a photograph of a page of the Atlanta ‘Constitution’ of Oct. 2nd, 1887, is the advertisement I spoke of. (Rec., 1604). * * * He called my attention to it, and I told him to answer the advertisement, and we got a reply from Dr. Pemberton. Well, we were both favorably impressed with Dr. Pemberton’s letter, * * * and, of course, a few letters passed, and we both went to Atlanta and had a conference with Dr. Pemberton (Rec., 1586) * * *. When we went to Atlanta we went to Dr. Pemberton’s place of business to see him. His place of business then was 107 Marietta St., that is my recollection. He was doing business under the name of Pemberton Chemical Co.,—it was a two-story brick residence (Rec., 1605). * * * He showed us what he had, went over the whole business, made us his proposition (Rec., 1586). * * * He had an office in the front room, the back hall had his manufactured goods in it, all the first floor was used for the laboratory, his basement was also used, and Dr. Pemberton lived in the second story. He was then making ‘Wine of Coca,’ ‘Coca-Cola,’ ‘Globe Flower Cough Syrup,’ ‘Indian Queen Hair Dye,’ ‘Triplex Pills,’ he made a liniment,—‘Mustang Liniment,’—his blood medicine, ‘Pemberton’s Styl-

lingia,' 'Pemberton's Compound Extract of Stillinia,' I believe that he had a preparation that he called lime juice and ginger. That is about all I can remember now. During my visit there in 1887 I saw Dr. Pemberton actually making 'Coca-Cola' syrup (Rec., 1606). * * * We went back home and had the matter under discussion, and my uncle decided that he would not go in with it * * * but a few days thereafter I got a letter from the doctor that there was some other men figuring with him that would put in some money,—Mr. A. O. Murphy and Mr. Bloodworth. We three met in Pemberton's place of business in Atlanta and went over his business very thoroughly, and we agreed to go in with him (Rec., 1587). * * * I was to put in \$2,000, Mr. Bloodworth \$2,000, Mr. Murphy \$2,000, and Mr. Pemberton was to put in all his business, stock of goods he had on hand, good-will, formulas, trade-marks, and everything of every nature and character pertaining to his business, for another fourth interest valued at \$2,000. There was no agreement drawn up at that time, but it was agreed, and I moved my family to Atlanta sometime shortly thereafter in December. Mr. Murphy, or Mr. Bloodworth, was a little bit delayed getting up their money, and it was sometime in January, 1888, that the articles of agreement were drawn up and signed by us all (Rec., 1587). * * * A written contract of partnership was drawn up between us (Rec., 1607). * * * It recited all the facts. We three were to put in \$2,000 cash,—Murphy, Bloodworth, and Mayfield,—and Pemberton was to assign to us his assets, good-will, trade-mark, formula, stock on hand, and everything he had pertaining to that business he had, for one-fourth interest. * * * The right to sell and manufacture 'Coca-Cola' was included in that contract (Rec., 1607). * * * I act-

ually paid \$2,000 into the partnership, Mr. Bloodworth paid in \$2,000, it strikes me Mr. Murphy paid -1,500 and gave his obligation for \$500." (Rec., 1608).

A. O. MURPHY (Rec., 1287):

"This (*Defendants' Exhibit 22*) is a paper covering the dissolution of the partnership, * * * an agreement between the four partners consenting to my retiring and their assuming all the obligations and everything in the business in the caption of that contract the date is mentioned there when the partnership was formed. I suppose this is the exact date the partnership was entered into, or it would not have been specified in the agreement. It shows there as January 14th, 1888. * * * That is the original paper, written by my brother, who is a lawyer (Rec., 1287). * * * I left the contract [the original partnership agreement of January 14th, 1888] with Mr. Mayfield and Mr. Bloodworth when I sold out. I had charge of the office up to that time,—I kept it in my possession,—but of course all of the office papers were then turned over to them." (Rec., 1281).

J. C. MAYFIELD (Rec., 1607):

"I have not a copy of that contract now, nor the original. Mr. Murphy was the office man, Mr. Bloodworth was the road man, and I was the laboratory man. These papers were turned over to the office man, and after Mr. Murphy left us, Mr. Bloodworth was the office man, and he took charge of all papers of the company. I never had them in

my possession, except as being connected with the firm."

MRS. FRANCES B. THOMPkins (Rec., 1272):

"I am 29 years old. I live in Waynesboro, Ga. My father is T. C. Banks. Mrs. Shelverton * * * is my aunt. I was present after the death of Mrs. Shelverton's father when she was looking over some of his papers. She and I were living in the same house. It was just about three and a half to four years ago. Mr. E. H. Bloodworth was my grandfather, and my mother was the oldest child. He lived at her home more than anywhere else, and I was living at home at this time. It was after my mother's death and grandfather's death,—I am a widow and live with Mrs. Shelverton. We were there cleaning out my grandfather's trunk, and we were going through to see if there was any of grandfather's papers we wanted, and so she picked up this paper, contract, some sort of legal agreement,—I could not tell you exactly what it was. She read it to me and my brother sitting there beside her. She said, 'Here is this old contract between my father and Mr. Pemberton,' and in this contract were enumerated numerous articles that were to be manufactured, and among them was 'Coca-Cola,' and she read out the word 'Coca-Cola,' and she said to me, 'Isn't that awful to think that my father did not keep that.' She said, 'Think what we would have had today if he had not sold his formula to them, but had kept on manufacturing 'Coca-Cola,' and she said, 'Isn't it a shame that my father sold that, and that we are not making Coca-Cola today.' I remember the names that were signed to that contract, because she read them over

to me and said, 'Look at this; it looks almost like lithographing.' My grandfather's name was there, and I think it was signed by Mr. Murphy, my grandfather, Mr. Bloodworth, and Mr. Mayfield. I have no idea of the date of the contract. After she read it, it was tossed and thrown into the fire with some other books and papers that we had. We had no use for it, and were getting rid of all his rubbish." (Rec., 1272-4).

MRS. N. L. SHELVERTON (Rec., 1269-1272):

"My father is E. H. Bloodworth. * * * I did have papers belonging to my father. I was the oldest living girl, and when my father died he just told me that his papers were in his trunk and that I should go over them and keep what I chose and destroy what I chose. Soon after my father's death we moved away from Atlanta, and I destroyed all that I thought I wanted to destroy. We have been away from Atlanta four years, and papa died four and a half years ago (Rec., 1269). * * * I did not destroy any papers without reading them. The paper that made the most impression upon me,—that I hesitated to destroy, but finally did destroy, I am sorry,—was this contract, and with this contract I also destroyed some cotton papers that have proved a loss to me since. He was a cotton man. This business contract,—you know, a woman is not much of a business person, I suppose you would call it an agreement,—it was some kind of a legal contract, you know, regarding, I believe, my father and these other gentlemen,—Mr. Mayfield, Mr. Murphy, Mr. Pemberton and my father * * * who put up their money against the doctor's medicines,—against Dr. Pemberton's medicines, I mean. * * * I remember

some of the names of some medicines in that contract (Rec., 1270). * * * It had 'Wine of Coca' and 'Coca-Cola' in it, and, of course, that is the name that impressed me the most because it was then so much before the public. I do not remember the date of the contract (Rec., 1271). * * * The parties to that agreement were Dr. Pemberton, Mr. Mayfield, Mr. Murphy and my father. The medicines described were 'Indian Queen Hair Dye,' 'Globe Cough Syrup,' 'Lemon & Orange Elixir,' and 'Winè of Coca' and 'Coca-Cola' (Rec., 1272). * * * There were several of us, we were reading, and I did the reading. * * * Some of those that were present when I read them were my nephew and my niece. My niece's name was Mrs. Frances B. Thompkins, and Charles E. Banks was the nephew, and we were sitting there, and I was destroying and reading them aloud." (Rec., 1271)

THOMAS C. BANKS, of Newman, Ga. (Rec., 1408-1413):

"Before I came here I lived in Atlanta. Engaged in the railway mail service,—been in that business 29 years. I have lived in Atlanta for 25 years, —twenty-five,—twenty-six years. I knew E. H. Bloodworth. He was my father-in-law. I went to Atlanta before he did. He came there, I think, in '87, perhaps, or '88. He went to live with me,—he lived and occupied the same house at 8 Woodard Ave. We lived practically together most of the time. He came here to go into business with Mr. Mayfield,—Mayfield and Pemberton,—in the medicine business. He came there,—it must have been in mid-winter,—December or January, I do not recall the day or date. He went in business with

them. They were making 'Coca-Cola,' 'Stillingia,' a blood medicine, and 'Lemon & Orange Elixir,' 'Mustang Liniment,' 'Queen Hair Dye,' and 'Globe Flower Cough Syrup,'—I recall those,—well, perhaps something else I have forgotten about (Rec., 1408-9). * * * I cannot say I ever saw the contract of partnership. I heard them discuss it and all, but so far as reading the contract I cannot say I ever read it. * * * They came in possession of all those formulas for all those different drinks and proprietary medicines,—in possession of all of them." (Rec., 1412-13).

MISS MARION BLOODWORTH (Rec., 1262):

"My father was E. H. Bloodworth. * * * He came here to go in business with Mr. Pemberton, Mr. Mayfield and A. O. Murphy. I was living here with my sister when he came. He went in business with these parties. It was a medicine business, called the Pemberton Medicine Co. They came just before Christmas. It was in 1887 that they came here. * * * They made 'Globe Flower Cough Syrup,' 'Coca-Cola,' 'Lemon & Orange Elixir,' and 'Wine of Coca,' and some kind of hair dye, I do not remember that,—'Indian Queen Hair Dye,' that was it." (Rec., 1262).

Plaintiff read into the cross-examination of Miss Marion Bloodworth an alleged affidavit purporting to have been made by E. H. Bloodworth in Atlanta on August 9th, 1905, in which the following statements were made (Rec., 1265-6):

"In 1888 A. O. Murphy, of Barnesville, Ga., *Mrs.*

Diva Brown, and myself bought Dr. Pemberton's formulas, including 'Coca-Cola (1262). * * * Dr. Pemberton died soon after and we lost the 'Coca-Cola' name. We used the formula and called out goods 'Yum-Yum,' but failed to successfully introduce it." (1266).

In so far as this alleged affidavit states that Dr. Pemberton sold all his formulas, including "Coca-Cola," to the Pemberton Medicine Co., it of course speaks the truth, but the substitution of *Mrs. Diva Brown* for *J. C. Mayfield* as one of the partners in the Pemberton Medicine Co. is a piece of fiction. The original dissolution agreement, in evidence as *Defendants' Exhibit 22*, conclusively proves that Mrs. Diva Brown was not one of the partners, not to mention the testimony of A. O. Murphy, J. C. Mayfield, T. C. Banks, Miss Marion Bloodworth, Mrs. N. L. Shelverton, Mrs. Frances B. Thompkins, Asa G. Candler (Rec., 383) and F. M. Robinson (Rec., 360). That Mrs. Diva Brown had no interest in the business, but that J. S. Pemberton, A. O. Murphy, E. H. Bloodworth, and J. C. Mayfield were the only parties having an interest in the Pemberton Medicine Co. is also shown by the letter-head of the Pemberton Medicine Co., on which the names of the four partners appear, a photograph of which, duly authenticated by the Commissioner of Patents, is in evidence as *Defendants' Exhibit 21* (Rec., 1285), and a reproduction of which will be found opposite page 130 of Appellants' Brief. The fact is also shown by the certified copy of an application for a charter by which it was proposed to incorporate the Pemberton Medicine Co., which

document is in evidence as *Defendants' Exhibit 62* (Rec., 1616), and which recites the fact that Pemberton, Murphy, Bloodworth and Mayfield, doing business as the Pemberton Medicine Co., desired to be incorporated under that name.

This Mrs. Diva Brown was Mayfield's wife in 1887 and '88, and up until about 1898, when she secured a divorce and married a Judge Brown (Rec., 2419-20).

A. O. MURPHY (Rec., 1290):

"I suppose I had met Mr. Mayfield's wife. They lived in a different part of town from us, and perhaps I had been introduced to her by Mr. Mayfield. I just knew her as his wife. She had no interest in the business at that time, or during the time I was associated with it, whatever,—nothing to do with it."

Plaintiff read into the cross-examination of John D. Fletcher (Rec., 1096) an alleged affidavit purporting to have been made by Mrs. Diva Brown, who died before this suit was brought. In this alleged affidavit Mrs. Diva Brown is represented as swearing, among other things, as follows:

"About 14 years ago I was one of the members of the J. S. Pemberton Med. Co., of Atlanta, Ga. The firm consisted of Dr. J. S. Pemberton, of Atlanta, Ga., Mr. Murphy, of Barnesville, Ga., (a brother-in-law of Judge Simmons, of the Superior Court of Georgia), Mr. Bloodworth, of Barnesville, Ga., Mr. Mayfield, of Atlanta, *and myself*. Dr.

Pemberton put in the formulas of 'Coca-Cola,' 'Pemberton's French Wine Coca,' 'Indian Queen Hair Dye,' 'Lemon & Orange Elixir,' 'Globe Flower Cough Syrup,' etc., into the firm, and each of the other members of the firm put in a certain sum of money. Mr. Murphy did the advertising, Mr. Bloodworth the book-keeping, Mr. Mayfield *and myself* the manufacturing. Dr. Pemberton, who was in very poor health, superintended the manufacturing when well enough."

Mrs. Diva Brown stated the facts correctly in this extract, except for the addition of herself as a member of the firm and as having herself participated in the manufacturing. As will be shown later on, after her divorce from Mr. Mayfield, she made her living by selling some sort of formula for a cola drink which she represented to be the original "Coca-Cola" formula, and she made this affidavit, and got E. H. Bloodworth to make the affidavit above referred to, containing the statement that she was a member of the old Pemberton Medicine Co., and assisted in the manufacture of "Coca-Cola" herself, in order to lend color to her representations that the formula she was selling was the original "Coca-Cola" formula.

On August 1st, 1899, Mrs. J. S. Pemberton, widow of old Dr. Pemberton, made an affidavit before Fred W. Burress, a notary public of Atlanta, Ga., which was also witnessed by C. H. Crimm, in which she swore (Rec., 1618):

"That my husband, Dr. J. S. Pemberton, was the

originator of the formula for making 'Coca-Cola,' 'Wine Coca,' and other similar fountain beverages; that Mr. J. C. Mayfield, of Atlanta, was associated with Dr. J. S. Pemberton long before and up to the time of his death, and it was under my husband's own personal supervision and instruction that Mr. Mayfield was taught to manufacture these and other specialties. To my personal knowledge Mr. Mayfield was an expert in the manufacture of both the above commodities long before the present Coca-Cola and Wine Coca Companies were formed. * * * It is undoubtedly true that he is today the oldest and most efficient and experienced living man in the manufacture of those specialties, and the most reliable expert on the subject."

A printed copy of this affidavit is in evidence as *Defendants' Exhibit 66* (Rec., 1618), the original having been lost by one of the printers to whom it was sent as "copy." (Rec., 1619).

J. C. MAYFIELD (Rec., 1618):

"Mrs. Pemberton, on Aug. 1st, 1899, in Atlanta, Ga., did sign this certificate (*Defendants' Exhibit 66*), which reads as follows: * * * I was in Atlanta on August 1st, 1899, when Mrs. Pemberton signed it (Rec., 1618). * * * Mrs. Pemberton turned the original certificate over to me after she signed it. It must have gotten lost at some of the printers,—I had some of these things printed. I did keep it for quite a while, carrying it from place to place." (Rec., 1619).

C. H. CRIMM, Tennessee Manager of the Germania Life Insurance Co. of New York (Rec., 1038):

"I know Mrs. J. S. Pemberton, the wife of J. S. Pemberton, just slightly. I witnessed a certificate signed by her (Rec., 1038): * * * Mrs. J. S. Pemberton signed the certificate about 1889 [1899] in Atlanta, Ga., in the old Norcross Building. * * * It was along the line that they were associated in business. Mr. Mayfield was associated in business with her husband when they manufactured a beverage there several years ago,—along that line (Rec., 1039). * * * Q.—Do you remember the name of the beverage that she stated in that certificate that her husband and J. C. Mayfield had been manufacturing? A.—'Coca-Cola.' I don't know what became of the original certificate. I do not know what became of the gentleman who signed there as notary public, Mr. Fred W. Burress. He was a young lawyer there in Atlanta. I do not know [what] became of Mrs. J. S. Pemberton." (Rec., 1040).

Mrs. Pemberton died several years before this suit was brought.

J. C. MAYFIELD (Rec., 1588, 1608-9):

"Before the articles of agreement were signed, I was around his place of business all the time and was getting as well posted as I could, because it was agreed that I was to do the manufacturing (Rec., 1588). * * * Q.—Now, was the formula for making 'Coca-Cola' made known by Dr. Pemberton to the members of that partnership at that time? A.—It was to me. * * * He got his formula book and

called it over to me word for word before we left the Marietta St. place. * * * He was in bed sick, and we thought we ought to have it, you know,—we were looking after things, and we had paid in our money. * * * He sent for me, and I went up to his sick bed, and he had the formula book, and I brought me a book, and I copied everything, word for word, as he gave it out, with complete instructions. * * * Q.—Was the formula for ‘Coca-Cola’ copied by you at that time? A.—It was (Rec., 1608). * * * After the formation of this partnership, the partnership took the name of Pemberton Medicine Co. Under that name we manufactured ‘Wine of Coca,’ * * * ‘Globe Flower Cough Syrup,’ the blood medicine, ‘Lime Juice and Ginger,’ ‘Coca-Cola,’ ‘Indian Queen Hair Dye,’ * * * ‘Lemon & Orange Elixir. * * * After the formation of the partnership I made the ‘Coca-Cola’ syrup. When I made my first batch of ‘Coca-Cola’ syrup, Dr. Pemberton was there telling me,—I had to do all things,—and he would stand around and tell me how to do those things.” (Rec., 1609).

A. O. MURPHY (Rec., 1285):

“Dr. Pemberton and Mr. Mayfield had charge of the laboratories. Of course, I was in there off and on and aided myself in making it with them, but they were recognized as the head of the laboratory department. Mr. Bloodworth was on the road. Mr. Mayfield knew the formula for making the product,—that was done when Dr. Pemberton was at home. Mr. Mayfield was the practical man in the laboratory. Dr. Pemberton was simply directing him.”

T. C. BANKS (Rec., 1412):

"Mr. Mayfield, I think it was, that actually mixed the syrup, this 'Coca-Cola.' * * * He learned from old Dr. Pemberton, I suppose,—he was there to instruct him."

J. C. MAYFIELD (Rec., 1588):

"We did some manufacturing at his old place on Marietta St. * * * It seems to me like it was 107 Marietta,—somewhere along there,—it was below the post office. We did not like the place, and we looked for a new place on South Pryor St.,—I think it was the corner of Pryor and Hunter,—and we moved down there, maybe it was the last of January. * * * We had the office on the first floor, and the laboratory and all this other stuff on the second floor,—up stairs (Rec., 1588). * * * When we left 107 Marietta St., and went down to South Pryor St. * * * we continued to manufacture and sell 'Coca-Cola' syrup under that name for two or three months. After we began to manufacture this Coca-Cola syrup, we sold it. The trade was small. I do not suppose we ever shipped any in the beginning over 5 gallons,—some gallon jugs, and the 5-gallon kegs was the most sizes that we put it in then. We might have shipped some quart bottles, or something like that, to good people,—considered that was more a gift than anything else, a sample. * * * We put labels on these containers to indicate the contents of them; it had a label, 'Coca-Cola.' " (Rec., 1610-11).

A. O. MURPHY (Rec., 1281):

"After we formed this partnership, we continued to manufacture down on Marietta St. a very short time, and then we moved up on Pryor St.,—Pryor or Hunter,—and continued the manufacture there, right in the second story. My office was at first on the lower floor, and afterwards we moved the whole thing up-stairs (Rec., 1281). * * * We sold the entire line. * * * The 'Wine of Coca,'—it was a wine tonic put up in quart bottles,—and 'Coca-Cola,' the fountain syrup, and the 'Gingerine' were the three we pressed more than any others. * * * We manufactured and sold this product 'Coca-Cola' under that name." (Rec., 1282).

MISS MARION BLOODWORTH (Rec., 1264-1262):

"Immediately after this partnership was formed, they made and sold a product under the name of 'Coca-Cola.' I distinctly remember labels of 'Coca-Cola.' * * * The labels were pasted on kegs in one form or another,—I just remember seeing it on top of the kegs (Rec., 1264). * * * I used to go down to the place of business every few days. I drank that 'Coca-Cola' they were making. They were making a dark brown red syrup. It tasted like 'Coca-Cola' tastes now, and it looked like 'Coca-Cola.' They had little kegs, I would call them, for shipping it out. They were painted red. They had 'Coca-Cola' on them." (Rec., 1263).

THOMAS C. BANKS (Rec., 1409):

"They were making 'Coca-Cola,' * * * 'Stillin-gia,' a blood medicine, and 'Lemon & Orange Elixir,' 'Mustang Liniment,' 'Queen Hair Dye,' and 'Globe

Flower Cough Syrup.' I recall those,—well, perhaps something else I have forgotten about. * * * This product 'Coca-Cola' was a drink * * * a soda fountain drink. * * * Color of it was a dark mahogany. * * * It tasted like the 'Coca-Cola' you get now,—practically the same taste. I had occasion to go down to the places of business of these people frequently. * * * I often went down to the place of business during the time they were making that ['Coca-Cola.']. They were selling it,—shipping it around and selling it to soda fountains. They put it in small kegs and jugs that I saw. The kegs were painted red. The kegs were marked 'Coca-Cola,' in comparatively large letters (Rec., 1409). * * * I saw them making 'Coca-Cola' myself. I saw the labels, 'Coca-Cola.' " (Rec., 1413).

A. O. MURPHY (Rec., 1282-4):

"Something like a couple of months, or perhaps it might have been more than that, or three months after that, this controversy with the old doctor in regard to 'Coca-Cola,' in connection with his son Charlie, came up (Rec., 1282). * * * He sprung the question on us that he had sold the right to make 'Coca-Cola' to his son Charlie. Really, the way he expressed it, Charlie had, on certain occasions, obtained a written sale, a bill of sale, of this 'Coca-Cola' drink' and he would have to conform to it, but he would get us up a substitute which would be identically the same thing under a different name. Then arose the controversy in regard to that part of the business. This substitute he mentioned was not a different product from the one that we had theretofore been manufacturing, except in name. * * * We had a discussion about trying to keep the name

'Coca-Cola.' One would naturally suppose we had quite a row over it among the partners, but the whole gist of the thing is this: After we had gotten our hands into the fire and consummated the trade and got to work, and, as I stated a while ago, we found out to our sorrow that Dr. Pemberton was a drug fiend, and that of course was distasteful to any man of business, and the crowning act was when he violated his contract in regard to this 'Coca-Cola' syrup, and we, of course, had quite a warm time of it for a while, and he had to pacify us with the idea that we put out identically the same thing under a different name (Rec., 1283-4). * * * Most anybody acquainted with the history of these drinks knows that about that time 'Coca-Cola,' 'Wine of Coca,' or none of these drinks were very prominent. They were all in their infancy,—in fact, that drink idea, soda fountain drink idea, was in its infancy,—and rather than break up the whole thing and create a row among partners, we tacitly and silently went to work to see if we could off-set it in some other way (Res., 1284). * * * We first started out with the name called 'Yum-Yum,' and then we got on to one or two others,—'Koke' (Rec., 1283). * * * We held to 'Koke' after we used 'Yum-Yum' a while, and abandoned that and then agreed on 'Koke.' * * * 'Koke' was adopted for the product in the spring of '88. * * * The product was all labeled, whether it went out in the shape of kegs or barrels. We did not use much barrel stuff, of course, then; we were too little. Sometimes it went out even in smaller quantities than that, and, when put out, it was, of course, labeled just like 'Wine of Coca' was labeled,—labeled with this word 'Koke.' Those barrels and kegs, to my recollection, were painted just common red." (Rec., 1284).

J. C. MAYFIELD (Rec., 1588-9, 1612-13):

"Dr. Pemberton was in bad health. We did not know at the time what was the matter with him, but it developed later that he was a drug-fiend. Of course, we were all very much put out by the fact (Rec., 1588). * * * After we had manufactured and sold 'Coca-Cola' for two or three months, Dr. Pemberton stated to us one day that he had decided to give 'Coca-Cola' to his son. * * * I knew he had been having trouble with his son, who was an unruly bad boy, and he reported to us that he would have to give it to him to keep peace in the family (Rec., 1612). * * * Dr. Pemberton had a son, an only child, Charley Pemberton, who knew all about manufacturing these specialties. * * * He discussed it with me, that he would do the manufacturing, but it was agreed and understood that I would do the manufacturing. Naturally, it cut the son out of a position. He was disgruntled,—dissatisfied,—and made it up for the old man, Dr. Pemberton. * * * He said he would have to give him that business in order to keep peace (Rec., 1588-9) * * * but we did not agree,—this was after I bought a fourth interest in 'Coca-Cola,' after we had been manufacturing and selling and going around satisfied with the business. The old doctor was sick, and kept fretting around about it, and said it was not of much value, that "it had [not] been on the market very long"; that "we had the same formula and could go on and make the same goods under some other name and he would appreciate it. * * * The other partners and I did not agree to any sale or assignment of the business of manufacturing and selling 'Coca-Cola.' * * * We went ahead and sorter accepted the situation in a way. * * * We tried to

have peace in the family if we could, and we discussed among ourselves what to call our 'Coca-Cola,' and agreed upon the name 'Koke' (Rec., 1612-13). * * * We used a label to designate the goods, of course, and placed on the label 'Koke,' spelled 'K-o-k-e.' The product was not different from the product 'Coca-Cola,' there was no difference between the product which we thereafter labeled 'Koke,' and 'Coca-Cola.' We continued to manufacture 'Koke' by the same formula that old Dr. Pemberton turned over to us as the 'Coca-Cola' formula. After we had changed the name of this product from 'Coca-Cola' to 'Koke,' [when] we received orders from our old customers for 'Coca-Cola,' we shipped them 'Koke,' and wrote them a nice letter and explained the situation and conditions, which were always satisfactory; I never heard any complaints." (Rec., 1613-14).

MISS MARION BLOODWORTH (Rec., 1263):

"They made this 'Coca-Cola' three or four months; then they still made it and called it 'Koke.'"

THOMAS C. BANKS (Rec., 1410):

"If there was any difference between this preparation they called 'Koke,' and the preparation called 'Coca-Cola,' I could not tell it from drinking it and looking at it. It appeared to be the same thing. It was supposed to be practically the same thing, I think, under different name (Rec., 1410). * * * I first saw the change from 'Coca-Cola' to 'Koke' during the summer sometime, or spring-time. I cannot recall the exact time, but [it was] after they had been in business for some time. My father-in-

law (E. H. Bloodworth) told me about this trouble with Dr. Pemberton. (Rec., 1414-15).

ASA G. CANDLER, president of the Coca-Cola Co. (Rec., 382):

"The Pemberton Medicine Co.'s business was manufacturing 'Wine Coca,' and they undertook to manufacture,—it was a hair dye, and they had 'Globe Flower Cough Syrup,' and 'Compound Stillingia,' and shortly after I bought 'Coca-Cola,' they started out manufacturing a soda fountain drink which was as near like 'Coca-Cola' in color as they could get it,—that is, a man named Mayfield that was connected with that company,—he called it 'Yum-Yum.' * * * I am not certain whether that was manufactured by the Pemberton Medicine Co. or by J. C. Mayfield,—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. * * * I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that's right, they were connected with the Pemberton Medicine Co. * * * These people,—Mayfield, Bloodworth and Murphy,—were running the Pemberton Medicine Co.,—I don't think they ran it long,—and they were manufacturing a drink similar to 'Coca-Cola' at that time (Rec., 383). * * * You ask whether *April 14th, 1888* * * * *was the first time I ever owned any interest in 'Coca-Cola';* * * * *I believe it was,* I can't say positively,—it looks like it,—*that's the record.*" (Rec., 382).

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co. (Rec., 358), and for 22 years its secretary

(Rec., 353), says, "I don't know that that is my business to be giving you," (Rec., 359), but (Rec., 359):

"Dr. Pemberton and some other gentlemen formed the Pemberton Medicine Co. * * * I think they operated on South Pryor Street. They did a medicine and extract business,—they manufactured those articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks,—cola's,—to some extent (Rec., 359). * * * XQ.—You knew they were manufacturing drinks and putting them on the market? A.—I heard they were manufacturing drinks, yes. XQ.—That was part of the history of the community, that they were doing that? A.—Yes, sir. As to the associates which Dr. Pemberton had in the Pemberton Medicine Co., I just remember that a man by the name of Mayfield was one of them, and a Mr. Bloodworth was another one,—I don't remember his name now,—Murphy, I guess it was (Rec., 360). * * * The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. Yes, I observed that just like I did Hagan & Dodd's,—what comes out. * * * I don't know anything about the quantities they manufactured or sold, but I know [that they made and sold a cola drink] just as well as I know that Hagan & Dodd manufacture 'Ko-Nut,' but I don't know anything about the extent of it" (Rec., 364-5). * * * The other products that were gotten out by the Pemberton Chemical Co., aside from 'Coca-Cola,' were 'Pemberton's French Wine Coca,' 'Globe Flower Cough Syrup,' 'Indian Queen Hair Dye,' and a preparation called 'Gingerine.' So far as I know, it went from the Pemberton

Chemical Co. to the Pemberton Medicine Co. (Rec., 362).

J. C. MAYFIELD (Rec., 1614):

"After we had adopted and applied this name 'Koke' to our product, the partnership as then organized continued up to about, I believe, some time in June, [when] Mr. Murphy withdraw [*Defendants'*] *Exhibit 22* is an agreement whereby we agreed to let Mr. Murphy withdraw from the partnership. We all signed that. That is my signature, those are the signatures of the other parties. I recognize them as the genuine signatures. *Exhibit 22* correctly sets forth the agreement we entered into at that time. After the retirement of Mr. Murphy, we continued the business as a partnership, us three, instead of four,—Mr. Murphy had withdrawn,—Mayfield, Bloodworth and Pemberton. We continued to manufacture and sell 'Koke' (Rec., 1614). * * * A short time thereafter Dr. Pemberton died. * * * We had to make a settlement, of course, with the Pemberton estate,—Mrs. Pemberton and her son (Rec., 1590-1). * * * Mr. Bloodworth and I had a conference with Mrs. Pemberton. * * * We did not care to go on with the partnership, and we wanted to divide up (Rec., 1615). * * * Mrs. Pemberton took the formula and business of the 'Indian Queen Hair Dye,' and we had quite a lot of manufactured goods, and we gave her one-third of the manufactured products (Rec., 1591). * * * Mrs. Pemberton did not get any interest in 'Koke,' or the 'Koke' formula (Rec., 1615). * * * After that Mr. Bloodworth and I continued in business. * * * He and I went on as partners. * * * He and I owned the business

equally (Rec., 1615). * * * We moved then around from the South Pryor St. Place to Trinity Ave., in a little cottage we got for a good deal less money (Rec., 1591). * * * Mr. Bloodworth kept the books, I did what manufacturing was to be done (Rec., 1591). * * * Mr. Bloodworth and I continued to manufacture and sell 'Koke' until 1895,—right after the Cotton States Exposition, after the fair there, 1895,—and then I bought out Mr. Bloodworth (Rec., 1615). * * * After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Company of America. I have sold it in receptacles labeled with the name 'Koke' during all of that time (Rec., 1616-17). * * * Paper marked Defendants' Exhibit 63 is the charter of the Koke Company of America. I sold the Koke Company of America all my interest in everything I had in the 'Koke' business. * * * The Koke Company of America has continuously owned the 'Koke' business * * * from its organization down to date. The Koke Company of America sell to their agents,—give them a license to do business in a certain territory. The Southern Koke Co., Ltd., is just an agent to the Koke Company of America,—a selling agent,—* * * and the Koke Company of Texas,—all the same,—are licensees for certain territory." (Rec., 1617-18).

The continuous manufacture and sale of "Koke," from 1888 to date, is shown by the following witnesses:

Thomas C. Banks (Rec., 1411).
 Miss Marion Bloodworth (Rec., 1267).
 H. C. Groves (Rec., 1213).
 L. A. Holley (Rec., 1274).

- ¹George R. Edmondson (Rec., 1299-1300).
 S. T. Mayfield (Rec., 1457, et seq.).
 W. F. Boylin (Rec., 1073).
 W. M. Sidebottom (Rec., 1162).
 J. B. Freed (Rec., 1172).
 P. B. McGraw (Rec., 1313).
 C. N. Baker (Rec., 1406).
 J. W. Mayfield (Rec., 1518, et seq.).
 R. J. Baker (Rec., 1302).
 M. Casey (Rec., 1305).
 W. B. Arnold (Rec., 1308).
 Oliver Prince (Rec., 1319).
 G. W. Freeman (Rec., 1327).
 W. F. Neal (Rec., 1328).
 A. S. Joseph (Rec., 1330).
 Mrs. M. L. Edwards (Rec., 1336).
 H. O. Adams (Rec., 1343).
 E. D. Montgomery (Rec., 1356).
 A. F. Watkins (Rec., 1377).
 John Smith (Rec., 1387).
 J. C. Mayfield, Jr. (Rec., 1565).
 L. E. Whitmire (Rec., 1699).

When this case was before the Patent Office, the Examiner of Interferences, in a decision which was later affirmed by the Commissioner of Patents, and which plaintiff now insists is *res adjudicata*, held upon this same record:

"That the Pemberton Medicine Co., of Atlanta, Ga., made and sold, during the period from 1888 to 1898, in containers bearing the label 'Koke,' a product which was used in the making of a soda fountain beverage, is held to be established."

And again, after stating that it was the Coca-Cola Company's contention that Mayfield used the name "Koke" for the first time in June, 1909, the Examiner proceeded:

"It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word 'Koke' as a name for a soda fountain beverage during the period from 1888 to 1903, after which Mayfield became most active in his efforts to promote 'Celery-Cola.' "

SCHEDULE II.

The Attack Upon J. C. Mayfield.

The purpose of this attack on Mr. Mayfield is well stated in Elliott's General Practice, Vol. 2, Sec. 841, p. 1010, under the title, "Articles of Evasion," as follows:

"Evasions assume many forms. A common mode of evading the real question is to assume that wrong has been perpetrated, or a crime committed, and to vehemently denounce the wrong or the crime. * * * A skillful sophist very often directs attention from the failure or insufficiency of proof by keeping the attention of the jury fastened upon the consequences of the wrong which he attributes, by a sly and groundless assumption, to the party against whom he pleads. It is not uncommon for cunning advocates to direct their main attack upon some particular witness or witnesses, and to assume that the whole case rests upon the testimony of the witness or witnesses thus assailed, ignoring entirely all other testimony. * * * In many instances the force of evidence is evaded by a stormy attack upon the character of a party, leaving entirely out of consideration the fact that even a bad man may have a good case well proved."

Plaintiff says Mayfield was not making "Koke" in Birmingham in 1905 and 1906, because, in a letter to Pogue, he used the phrase, "Celery-Cola" is my all." If the phrase were entitled to the force which plaintiff attributes to it, then it would mean that Mayfield was then making nothing but "Celery-Cola." The truth is, how-

ever, as admitted by numerous witnesses for the plaintiff, that Mayfield and his companies at that time were making numerous soda water flavors, besides selling vinegar, and their products.

For instance, D. E. Moody says, "We bottled a general line of soda water" (Rec., 1888). B. U. Hopper says he worked for the J. C. Mayfield Mfg. Co., and that he knew of that company, and of the Celery-Cola Co., from 1904 to 1906 (Rec., 1891). He then says: "I don't know just whether I could tell all the soft drinks they manufactured, or not; they manufactured a lot of soda water extracts and syrups that they sold" (Rec., 1891). W. M. Smith says (Rec., 1893): "The Mayfield Mfg. Co. was engaged in 'Celery-Cola,' 'Pepsin-Ola,' 'Hop-Ale,' cider, and vinegar, and stuff like that." He says he was with the Mayfield Co. from about 1902 to 1907 (Rec., 1893). J. T. Ensley (Rec., 1901) says he worked for the Mayfield Mfg. Co. from about 1900 to about 1906, and that "they put out all the popular flavors, I believe, such as lemon extracts and syrups, vanilla, strawberry, and all the soda water drinks, and 'Vig-O,'—a specialty drink,—'Pepsin-Ola,' 'Peppo-Ade,' 'Celery-Cola.' * * * They also sold different kinds of wine and 'Hop Ale.'" Thomas Dickson (Rec., 1907) says: "They were making 'Celery-Cola' and 'Pepsin-Ola' and soda water and such things as that." Tom Anderson (Rec., 1913) says they bottled 'Celery-Cola,' ginger ale, and all the different soda water flavors.

'The statement that "the Government prosecuted May-

field and associates concerning 'Celery-Cola' (U. S. v. Mayfield, 177 Fed., 765), and, upon conviction for violation of the Food & Drugs Act, the affairs of the Celery-Cola Co. were wound up, the formula for 'Celery-Cola' changed, and the revised product rechristened 'Koke,' " is highly misleading. It contains just enough truth to lend color to the statement; the rest is fiction.

There were four concerns altogether connected with the sale of "Celery-Cola" in Birmingham. The J. C. Mayfield Mfg. Co., a Tennessee corporation (Rec., 2423) of which J. C. Mayfield was president (Rec., 2423), was the owner of the "Celery-Cola" formula, trade-mark, and business, Mayfield having conveyed the same to that concern upon its organization at Nashville, Tenn., in 1903 (Rec., 2432). The Celery-Cola Company was an Alabama corporation having a license from the J. C. Mayfield Mfg. Co. giving it the exclusive right to sell "Celery-Cola" at wholesale within certain States (Rec., 2432). Mayfield was also president of this company, and a stockholder therein. The Birmingham Celery-Cola Co. was also an Alabama corporation (U. S. v. Mayfield, 117 Fed., 765). It had a sub-license from the Celery-Cola Company for part of its territory. The Celery-Cola Bottling Co. was still another Alabama corporation (Rec., 1683). It was a bottling concern having the exclusive right to bottle "Celery-Cola" in Birmingham and its suburbs.

It was the *Birmingham Celery-Cola Co.* whose officers and agents were prosecuted in *U. S. v. Mayfield*, 177 Fed.

765. Concerning this case, J. C. Mayfield said (Rec., 1600):

"A wholesale drug firm in New Orleans ordered a gallon of 'Celery-Cola' syrup. They expressed it to them, and it was carried down through their shipping department, turned over to a chemist,—a U. S. chemist,—and they reported that they found cocaine in 'Celery-Cola.' I was notified of it. I was out west. I notified my chemist, Van Deusen, about it. Of course, we knew it had no cocaine in it when it left the St. Louis [plant], and we could not account for it. Mr. Van Deusen came on up to New Orleans, and explained here to the chemist that there was no cocaine in our goods, but they contended that they found it in that sample. But we had, up to the time of the passage of the Pure Food Law, and when it took effect, of course used the fluid extract of coca, and we had the goods all over the country in the hands of the bottlers and the 'fountain men. We tried to get it back. We thought we did have the most of it back. I remember very well of destroying quite a lot of it. But it was found that some of this returned goods was in the plant there, and they used it. We had two or three ways to account for that; either they used some of the goods made prior to this act going into effect, which had been shipped back, or they had experimented a little themselves, or had put [it] in after it left the factory. * * * I do not believe I was ever a stockholder of record, but they did get a suit against them back there in the court in connection with this sample of 'Celery-Cola' that had cocaine in it, and my name was mentioned in the suit. The other *partners* [parties] who were connected in the business cared nothing about it, because the business had been

wound up by the bankrupt court, and there was no defense, is my understanding. In fact, I was never served with a summons, was not present, and presume they just took the shortest and quickest way out of it."

After this trial the manufacture and sale of "Celery-Cola" was not discontinued, nor was the use of the name "Celery-Cola" abandoned. The *Birmingham Celery-Cola* Co., which was merely a licensee of the J. C. Mayfield Mfg. Co., had already been wound up in bankruptcy before the trial took place (Rec., 1601), but the winding up of that concern no more stopped the manufacture and sale of "Celery-Cola" than would the bankruptcy of any other jobber or wholesale dealer wind up the business of any other manufacturer. "Celery-Cola" is still being manufactured and sold by the J. C. Mayfield Mfg. Co. (Rec., 2446). The formula for "Celery-Cola" was not changed after this trial,—which did not occur until 1910 (*U. S. v Mayfield, et al.*, 177 Fed., 765),—it was changed in 1906 upon the passage of the Food & Drugs Act (Rec., 1601). Plaintiff argues that because Mayfield changed the formulas of both "Koke" and "Celery-Cola" at that time, so as to eliminate the cocaine and comply with the law, therefore he was making only "Celery-Cola" and not "Koke." (Plaintiff's original brief, p. 97). "Koke" contained the fluid extract of coca, prior to the passage of the Food & Drugs Act, just as plaintiff's product did, and just as "Celery-Cola" and all the other cola drinks did, and it was as necessary for Mayfield to eliminate the cocaine from

"Koke" as it was for him to eliminate it from "Celery-Cola," or for plaintiff to eliminate it from "Coca-Cola."

The assertion that, upon the conviction of the officers of the Birmingham Celery Cola Co., in 1910, Mayfield then changed the formula for "Celery-Cola," and re-christened the revised product "Koke," is pure fiction. There is nothing in the record to support the statement, and plaintiff has cited no page of the record where anything justifying the assertion can be found. On the contrary, it is admitted in the very next breath that Mayfield was making and selling "Koke" in Shreveport, La., at least as early as *June 1st, 1909*, whereas this trial did not take place until *March, 1910*.

Plaintiff shows remarkable powers of deduction on page 97 of its original brief. It quotes from Mayfield's deposition (Rec., 2414) as follows:

"The Coca-Cola Co., or somebody, gave me a black-eye with 'Celery-Cola.' It was dragged through the express company, the wholesale company, and the drug company of New Orleans, *and I put the name Koke*,—I was having these names registered in the States. I was kinder afraid of the Federal law, don't you see?"

And then gets off the following remarkable deduction:

"*Put the name Koke*,—of course, put the name Koke *on his revised Celery-Cola* and used it in 1909 for the first time," etc.

What Mayfield evidently started to say was that he "put the name Koke" *on record in the several States*,—referring to the State registrations which he secured in the latter part of 1910 (See Defendants' Exhibits 130 to 155, inclusive),—and that he applied for State registrations instead of a Federal registration in the Patent Office because he was afraid the notoriety resulting from the case of *U. S. v. Mayfield, et al., supra*, might have prejudiced the Government against his various products.

Plaintiff argues that, because in four (Plaintiff's Rebuttal Exhibits 85-86, 88, 89) out of twenty-six (Defendants' Exhibits 130 to 155, inclusive) of the applications for State registrations, the printed forms to be filled in used the word "trade-mark" instead of "label" in the space provided for the applicant's declaration as to the length of time "since which" the trade-mark or label had been in use, and that because the date which Mayfield placed in these blank spaces was "June 1st, 1909," therefore he admitted thereby that he had never used the word "Koke" prior thereto. The fact is that, after the Birmingham trial, he got up new labels for both "Celery-Cola" and "Koke" on which the statement was printed in box-car letters, "absolutely free from cocaine!" (See the specimens of labels attached to defendants' Exhibits 130 to 155, inclusive.) He felt this course necessary to off-set the damaging tales plaintiff's salesmen were telling the trade wherever they went. Being a layman, he probably thought that a "trade-mark" and a "label" were the same thing, and as this new design of "Koke" label had not been in use but a short

time, he inserted in the applications the length of time since which he had used that particular design of label. For instance:

J. C. MAYFIELD (Rec., 2413-2416):

"You hand me Plaintiff's Rebuttal Exhibit 84, and ask me if that is not an exemplified copy of the application which I signed; I was getting them all over the country,—I will say yes. You ask if I did not state in that application the following, referring to 'Koke': 'The same has been in use by applicant since June 1st, 1909;' I will say this, I had reference to this particular label,—keg and barrel label,—I was registering. I had reference to that particular label. I had no reference to the name 'Koke' at all, except that particular label. I attached the label to the application, so I would be on the safe side. *

* * You present me with Plaintiff's Rebuttal Exhibit 85, which you say is an application to the Secretary of State of Indiana. * * * You ask if I made this statement in my application, printed on it: 'Length of time, if any, during which trademark "Koke" has been in use? A.—Since June 1st, 1909;' I had attached to my application to that state, as I did in this particular instance, that particular label. My label does not appear on the copy of the application you present me, but it did on the application which I made. I attached it to all of them. *

* * That was when I had that particular label made. I was referring to the label 'Koke,'—that particular label. You hand me a copy of the application to the State of Massachusetts, marked Plaintiff's Rebuttal Exhibit 86, and ask whether I signed the affidavit in that; well, they have not got my label attached thereto, which I attached to all the differ-

ent state applications. I will say that copy presented to me is incomplete. You ask if I made this statement: 'Length of time, if any, during which the trade-mark has been in use?' Since June 1st, 1909'; I meant this particular label. I did not mean the *name* 'Koke,' but the *label* that I attached thereto, to every trade-mark I had in each state. * * * You hand me Plaintiff's Rebuttal Exhibit 88, being a copy of the application for the State of California. * * * You ask if I did not swear in that application that: 'This trade-mark consists of "Koke, a beverage."' This trade-mark has been used in its business since the 1st day of June, 1909; not the trade-mark, I meant this particular *label* that goes on the kegs and barrels. That is what I referred to. The *word* 'Koke' had been in use since 1888. But this *label*, as you have got in the preceeding one (Plainwhat I had reference to. You present me with a copy of an application to the State of Pennsylvania, marked Plaintiff's Rebuttal Exhibit 89. * * * You ask if I did not state in that application: 'The trade-mark consists of the word "Koke;" the length of time, if any, during which it has been in use,—fourteen months;' I had attached thereto this particular *label*, as you have got in the preceding one (Plaintiff's Rebuttal Exhibit 84), I had that made,—that is what I had reference to,—but the *word* 'Koke' had been in use in different shapes and different forms for years and years prior thereto, but I had reference to this particular *label*!. I was getting State registrations on *labels*."

The majority of the applications had the word "label" instead of the word "trade-mark," and the question asked of the applicant was: "Length of time, if any, since which this *label* has been in use." (See Defendants'

Exhibits 130 to 155, inclusive.) These applications were all made at about the same time, and Mayfield probably read a few of them hurriedly, and seeing that the information required in those which he read, was the length of time during which he had used the particular design of *label* which he was required to attach, supposed that all the rest were the same, and filled in the blank spaces without reading the printed matter. Even if he had noticed that some of them read "trade-mark" instead of "label," that wouldn't have meant anything to him, for he shows in the above extract from his testimony that he didn't know the difference between a "trade-mark" and a "label." Indeed, the person who got up the application blank for the State of Nebraska evidently didn't know the difference either, for, in the application to that state (Plaintiff's Rebuttal Exhibit 87), the printed form reads, "The said trade-mark *or* label has been in use since"

Then plaintiff refers to the fact that in 1911 J. C. Mayfield, on behalf of the Koke Company of America, purchased from Christy & Huggins, doing business as the Murfreesboro Bottling Works, the registration of the word "Koke" in the Patent Office which they obtained in 1905, (See Defendants' Exhibit 129) and that later this registration was put in interference with an application of W. L. Bitting, of Sherman, Texas, to register the word "Koke," and that Mayfield, on behalf of the Koke Company of America, bought Bitting's application (See Defendants' Exhibit 128); and plaintiff argues from this that Mayfield had not used the word "Koke" before Christy & Huggins and W. L. Bitting began to

use it, "because," plaintiff says, "if he had, it is unlikely that he would have bought these registrations."

J. C. MAYFIELD (Rec., 1603, 1664, 1674, 1675):

"That was in 1911. I heard from some traveling men along there that,—I forget just how I got it,—there was a firm in Murfreesboro that owned a trade-mark on 'Koke,' and [that] I was spending a lot of time and money in building up the business for them. * * * I went to see them and found out it was true. They were doing a pretty nice business, they said, and showed me their registered trade-mark. I explained to them my long usage. I knew I could win out in the courts, but did not care to do that. They had done some advertising, popularizing my 'Koke,' and finally I said, 'Let's see if we can't get together on a business proposition.' Well, we did. I bought the 'Koke' for the U. S., except the State of Tennessee (Rec., 1603). * * * I was using that label long before I heard of the Murfreesboro people having a trade-mark (Rec., 1664). * * * W. L. Bitting lived in Sherman, Texas. * * * He had the label registered quite a while,—since '98,—and the first I paid any attention was when he filed his papers in Washington for a trade-mark based on this registered label (Rec., 1674). * * * Mr. Bitting undertook to change his registered label to a registered trade-mark, and I had the Murfreesboro registration of record in my name, and I received notice of Mr. Bitting's application, and that is where I got hold of it. I got this assignment from Bitting rather than fight it out. My attorney said we could beat it out, and thought it best not to buy. I said I thought it was the cheapest, quickest, and most satisfactory

way. * * * I bought it more to get it out of the way. It was a cloud on my title, and that was the most satisfactory way to get rid of it." (Rec., 1675).

Then plaintiff argues that Mayfield did not use the word "Koke" prior to 1909 because in the license from the Koke Company of America to the Southern Koke Co., Ltd., (Plaintiff's Exhibit 174) it is recited that the Koke Company of America is the owner of a Patent Office registration of the word "Koke," which registration it obtained by purchase from the Murfreesboro Bottling Works. This is most remarkable logic. It is not pretended that either Mayfield or the Koke Company of America ever obtained a *registration in the Patent Office* of the word "Koke" until the Koke Company of America, acting through Mayfield as its president, bought the Murfreesboro registration to remove it as a cloud on his title, which rested therefore solely upon priority of adoption and use.

Then it is said that because Mayfield did not mention his priority of usage in several letters he wrote Christy & Huggins concerning the Bitting interference, but did make the statement that "this party *claimed* priority to right so I understand," therefore Mayfield did not use the word "Koke" prior to 1909. This is another wonderful specimen of logic. What object could Mayfield have had in telling Christy & Huggins in these letters that *he* had used "Koke" since 1888? Christy & Huggins couldn't testify as to *Mayfield's* use of the word. All they could testify to was *their* use, and Mayfield was inquiring of them as to *their* use, when he learned of the

Bitting interference, to ascertain whether or not *their* testimony as to *their* use of the word would be of assistance to him in the then impending fight with Bitting. Of course, he informed them what the issue was that the interference raised,—a question as to priority of use,—and explained to them, so they would know on what point he wanted them to give him information, that Bitting *claimed* to have had priority of use. As he had already bought the Murfreesboro registration, and had the assignment recorded in the Patent Office in the name of the Koke Company of America, if Christy & Huggins could have proved use of the word “Koke” by them prior to 1898 it would have saved Mayfield the trouble and expense of looking up the witnesses to prove his own use of “Koke” since 1888, for he could have defeated the Bitting interference on the strength of the Murfreesboro title without having to go into his title at all

Plaintiff evidently took its line of reasoning from its bottler, J. W. Huggins, who said (Rec., 2024):

“It strikes me as very strange that if he [Mayfield] ever used the word ‘Koke’ prior to 1911 he would buy it and not mention it to me. No, sir, I am not aware of the fact that prior to the time he called on me he had actually registered the word ‘Koke’ in every state in the Union. He never mentioned it to me. I think if that had been a fact he would have mentioned it,—I feel certain he would.”

As a matter of fact, Mayfield had registered his label,

with the word "Koke" on it, in practically every state in the Union more than a year prior thereto. (See Defendants' Exhibits 130 to 155, inclusive, and Defendants' Exhibit 156).

Then plaintiff flourishes the "Rice Record" with much gusto. This is a transcript of the evidence in a case tried in 1907 before the police court of Birmingham in which a scamp by the name of Melville Rice, who had been a book-keeper in the employ of the J. C. Mayfield Mfg. Co. at Birmingham, was prosecuted for grand larceny for stealing the "Celery-Cola" formula (Rec., 2419). Rice was found guilty and bound over to the grand-jury (Rec., 2419; Plaintiff's Rebuttal Exhibit 8), but at the trial before the police judge Rice's attorney, at the instigation of Mrs. Diva Brown, Mayfield's ex-wife, who was present and supplying the attorney with the material for his cross-examination (Rec., 1905-6, 1987), made such a strenuous effort to force Mayfield to reveal every detail of his formula in all its minutiae, and was allowed so much latitude in this respect by the magistrate, that Mayfield evidently decided not to go before the grand-jury, and not to appear in the case again as a witness, for fear they might repeat the inquiry into his formula, and force him to divulge not only the "Celery-Cola" formula, but even his "Koke" formula. So the proceeding was dropped. Rice, however, admits that he was guilty. He says (Rec., 1987) :

"No, sir, I never made a drink called 'Caffa-Cola.' * * * I was experimenting somewhat on my

own account with a drink which I intended to call 'Caffa-Cola.' Oh, yes, I had considerable stationery with that name printed on the heading, and that stationery was found in my room when the officers went there,—they found everything that was up there."

Plaintiff insists that Mayfield is impeached as a witness because, when he was asked in New Orleans on March 10th, 1915, concerning this Rice case, "You were not at the hearing?" he replied, "No, sir;" and then, later, when recalled to the stand in Chattanooga on July 5th, 1915, he said that if the record showed he had said, "No, sir," in reply to that question it must have been a typographical error, because he was present at the trial before the magistrate and would certainly have answered "Yes, sir," to a question of that kind, and believed that he had in fact so answered. If the stenographer correctly transcribed his notes, it is probable that what Mayfield had in mind when he answered, "No, sir," was the hearing before the grand-jury. The question asked of him was, "You were not present at the hearing?" The previous question was, "But he was *prosecuted*?" to which he replied, "I do not know, only about the *case*." Then followed the question, "You were not present at the *hearing*?" A.—No, sir." He knew that he had not been present at the hearing before the grand-jury to prosecute the case in the criminal court, and that he had only attended the preliminary investigation before the magistrate, and when he was asked if Rice was "prosecuted," and, immediately after, if he was present at the "hearing," he evidently misunderstood the question and

thought he was being asked about the proceedings in the higher court. It is not uncommon for laymen to become confused when they encounter legal terms. Then, again, many of Mayfield's answers were given by simply shaking or nodding his head. He had to be repeatedly cautioned to speak out, and not to nod, as the stenographer couldn't get the "nod" in his notes. It may be that he nodded, "Yes, sir," and the stenographer just assumed that he had shaken his head for, "No, sir."

It is somewhat surprising to find counsel asserting that, if Mayfield had answered, "Yes, sir," they would have proceeded to question him further about his testimony in that case, and confronted him with the transcript of his testimony, in view of the fact that plaintiff only succeeded in getting the "Rice Record" admitted in evidence, over the objection of defendants, upon the express representation of counsel that they did not have that record at the time they first cross-examined Mayfield in New Orleans on March 10th, 1915, and did not then know of its existence. (Rec., 1942, 1880).

HAROLD HIRSCH, Esq., General Counsel for the Coca-Cola Co., (Rec., 1942):

"I wish to state that the transcript of the record in the case of the *State v. Melville Rice* was received by me on or about the middle of May, 1915, from Birmingham, Alabama, and that it was only a short time before that that I had any knowledge of the existence of this transcript of this record, and that

I had no knowledge of it at the time Mr. Mayfield was on the stand in New Orleans."

Defendants objected to the introduction of this record because no foundation had been laid for it in the examination of Mr. Mayfield, in that he had not been asked concerning the testimony appearing therein prior to the introduction thereof (Rec., 1880). Of course, if counsel actually had the record at the time they examined Mr. Mayfield in New Orleans, as they now intimate, then that record should never have been admitted at the time plaintiff offered it, and it should now be stricken because its admission was obtained by misrepresentation and fraud.

When the court below admitted this record in evidence, defendants then offered the "Rucker Record" in evidence, under precisely the same circumstances as were represented to exist in the case of the "Rice Record." Candler, Robinson, Dobbs, etc., had not been asked on cross-examination to explain their testimony in the "Rucker Record," for the reason that counsel had not heard of that record, and did not know of its existence, until after all the depositions had been taken for both sides, and the time for taking depositions had closed, and they did not receive a copy of its until two or three days before they started west for the trial of this case at Prescott, Arizona. When they offered the record in evidence, they also offered to give Candler and the other witnesses an opportunity to appear and make such explanations as they might desire to make, but the offer was declined. The court below admitted

the "Rice Record," but excluded the "Rucker Record," to which action defendants' duly excepted. (Rec., 2501). Error was not assigned to this action of the District Court because of the rule requiring exceptions to the admission or rejection of evidence to "quote the full substance of the evidence admitted or rejected." Both records had been misplaced during the year intervening between the trial of the case below and the entry of the decree therein, and were not found until after the time for filing the assignment of errors had expired. It is insisted, however, that the rejection of the "Rucker Record," under the circumstances, was "a plain error occurring on the face of the record."

The main thing harped on in the "Rice Record" is the "Dear Judge" letter. Mr. Mayfield's explanation of this much overrated document is satisfactory and complete, and is borne out by the record in every detail. It completely refutes the inference sought to be drawn and removes the last suspicion of bad faith.

J. C. MAYFIELD (Rec., 2419):

"This 'Dear Judge' was the husband of my first wife. I will state, however, that she secured a divorce from me in Atlanta legally. The court gave me the children, and I did the best I could to raise them and educate them and bring them up. My wife was demented * * * but at times she had rational intervals, and at those times she was very grasping,—making money,—and from the fact that I bought out the 'Coca-Cola' business while she was my wife, she thought she was entitled to a copy of

the 'Coca-Cola' formula, notwithstanding the fact that she made a final settlement with her attorney that was satisfactory. This letter was written several years after our divorce. She demanded of me a copy of that formula. I put her off with one excuse after another. At this time my son and I had a little business in Jersey City. She went to his place of business,—I had no objection, because my son was her son. I was over there once or twice, and she realized the value of the 'Coca-Cola' formula,—or the 'Koke' formula, which was the same,—and thought if she could get a certificate from me she would be able to make considerable money by selling this formula. I put her off with one excuse after another, to the effect that I had misplaced the formula,—lost it here, yonder, or some place else,—and that I would get it. I wrote her and wrote Judge Brown several letters along that line, but she was so very anxious to get it that she came to Boston. * * * When I wrote this letter in question she was there. I gave it to her. She came there for it. As I said before, she was demented. I wrote that letter, and I wanted to make it ring with a genuine ring, so that she and Judge Brown, who was her lawyer,—he was her husband, but he was a lawyer, of course, he was a judge,—and she went back satisfied with that letter. I had put her off, as before stated, with other excuses. I promised in that letter to be in Jersey City or New York on Monday. I was not there, and did not go. If I had gone and given her a copy of my formula, and taught her and Judge Brown how to make 'Koke,'—'Coca-Cola,'—this letter and Mrs. Brown would never have appeared in the Rice case; but I did not go because it was practically my all. I came on back home. I realized what I was up against,—a woman who was demented and deter-

mined to have a copy of this formula,—and, being the mother of my children, naturally I thought and planned every way possible to get around giving her what she wanted without wounding her feelings. About the same time I received a letter from my father that one of my children was sick, so I left Boston. I did not go to New York, or to Jersey City, nor did I comply with my instructions in that letter. I came on to Atlanta, and then to Birmingham. Because I did not do what I promised to do, she appeared in this Rice case for no other reason in the world except to get all she could from me relative to this formula. She had no interest in the case, and she was there, and it was her questions, largely, that I answered. Of course, she propounded them through the attorney. The attorney did not know anything about all those oils, and all those things,—she, in a measure, did,—that is what she was after. She had possibly a superficial knowledge of the formula, and she wanted facts,—the proportional parts,—and, by being there, she hoped to get them. I evaded, in a way, a great many of her questions,—those which did not apply to the case at issue,—knowing that she was not at herself. I had the city physician of Birmingham, Alabama, to be present at that time, and he was there. I told him what I had to contend with, and he said he would be present, and he noticed her condition. As before stated, the case at issue had no bearing on a great many of these questions, and she had demanded a copy of the ‘Coca-Cola’ formula,—or the ‘Koke’ formula,—and I had told her and Judge Brown that I had lost it, or misplaced it, and she was there to get all the information she could. Of course, I had not lost it, and I had not misplaced it, because I was making ‘Koke’ in Jersey City at that time from

the original 'Coca-Cola' formula,—I do not mean I was making 'Koke' in Jersey City at the time of the Rice trial, I am talking about Jersey City when I wrote this letter, and she was in Boston demanding of me a copy of that formula and the certificate from me that it was the original 'Coca-Cola' formula. I would not give it, but evaded her and put her off with the excuse that I had lost it, in order to get rid of the woman that was not at herself. I was trying to protect my property."

S. T. MAYFIELD (Rec., 1458):

"My father stayed in Atlanta until about 1898, —about 1897 or 1898, and when he left there he went to New York. * * * I stayed in New York for about a year, or a year and a half. When my father went to New York he manufactured 'Koke.' He manufactured it in Jersey City (Rec., 1458). * * * I do not know just how long father was in New York. I cannot remember the exact time. I was with him about a year and a half. He manufactured 'Koke' over in Jersey City, on Warren St., as I remember it. * * * With my father there in Jersey City, besides myself, was my mother and her husband, Judge Brown. She married Judge Brown at that time. Judge Brown lived in Jersey City." (Rec., 1470).

J. C. MAYFIELD (Rec., 1593-4):

"The Wine of Coca Co. people decided that they wanted to open an office in Boston [in 1898], and they wanted me to go to Boston to establish same there. * * * I did go, and I thought I would just move my 'Koke' business to New York. * * * My

son went ahead of me and picked out a little place in Jersey City. I would go over there often from Boston and manufacture goods for him. I did not manufacture every time, it was in the winter, but I would go over there and see how he was getting along."

Of course, Mrs. Diva Brown knew that he was making "Koke" in Jersey City, and of course she knew he was making it by the original "Coca-Cola" formula, which she knew he had obtained from old Dr. Pemberton in 1888.

J. C. MAYFIELD (Rec., 1682):

"After Mrs. Diva Brown left me, I have heard she went around the country claiming to have the original 'Coca-Cola' formula, and selling it. * * * She was making her own living, and that was the way she had of doing it."

FOHN D. FLETCHER (Rec., 1092-1095):

"I bought my drink from a man named Murphy, J. C. Murphy. He first called it 'Murphy's Cola.' (Rec., 1092). * * * The formula of 'Murphy's-Cola' was made by J. S. Pemberton, I suppose. That probably would be absolutely true, but I do not know. The formula I used subsequently, afterward, was sworn to by Mrs. Diva Brown as having been the original J. S. Pemberton formula. Mrs. Brown,—I understand she is dead now,—she afterward married a man in Birmingham. I never met her in my life. I understood that she was married to J. C. Mayfield; she is supposed to be the same

woman. I got my information from an affidavit, that the formula I bought from Mr. Romine, of Pulaski, in the year 1905,—I believe it was 1905,—he bought the formula from Mrs. Brown, who swore in that transaction to the affidavit she presented in the litigation I had with the Coca-Cola Co. as having been the original 'Coca-Cola' formula as put up by Mr. Pemberton in the preparation of 'Coca-Cola.' (Affidavit of Mrs. Brown): 'United States of America, State of Louisiana, Parish of Orleans, City of New Orleans: Personally came and appeared before me, the undersigned authority, Mrs. D. Brown, who, after being duly sworn, deposes and says: That this is the original "Coca-Cola" formula, owned and used *by her* before it was sold to the present Coca-Cola Company, of Atlanta, Georgia."

E. J. Smyly says (Rec., 1393) that Mrs. Diva Brown, who claimed to have been an ex-wife of J. C. Mayfield, sold him an alleged "Coca-Cola" formula in 1907. In a little pamphlet gotten out by her, part of which was read into the record by plaintiff (Rec., 1096-8), Mrs. Diva Brown made the statement that she was one of the members of the Pemberton Medicine Co.,—to which Dr. Pemberton transferred all his formulas and business, including the "Coca-Cola" formula and business,—in association with Dr. Pemberton, Murphy, Bloodworth and Mayfield. It is plain, now, why she got E. H. Bloodworth to make the affidavit he is alleged to have made on July 18th, 1905 (Rec., 1681) to the effect that:

"In 1888 *A. O. Murphy*, of Barnesville, Ga., and *J. C. Mayfield*, of Alabama, and *myself*, bought Dr.

Pemberton's formulas, including 'Coca-Cola.' Mrs. D. Brown was then the wife of J. C. Mayfield. *She was not known to us as a member of the Pemberton Medicine Co., but she spent considerable time in our laboratory, and took a great deal of interest in our business.*"

This evidently did not satisfy Mrs. Brown, so she got Bloodworth to make another affidavit on August 9th, 1905, reading this way (Rec., 1265) :

"In 1888 A. O. Murphy, of Barnesville, Ga., *Mrs. Diva Brown*, and myself bought Dr. Pemberton's formulas, including Coca-Cola. Mrs. Diva Brown spent considerable time in our laboratory and took quite an interest in the business."

J. C. MAYFIELD (Rec., 1682) in referring to this affidavit, said :

"I have seen the whole thing. It is not true. This is true, that A. O. Murphy, of Barnesville, and J. C. Mayfield, of Alabama, were connected, but my wife had no connection whatever."

(And again (Rec., 1679-80) :

"XQ.—And Mrs. Diva Brown was around the plant in Atlanta, Ga.,—she was Mrs. Mayfield at that time,—was around the plant in Atlanta, Ga., was she not, when you first started to manufacture?
A.—No, sir, she was not there in 1888. * * * She was not around the place. Nobody ever saw her around there during the first business there, 1888 or 1889."

A. O. MURPHY (Rec., 1290):

"She had no interest in the business at that time, or during the time I was associated with it, whatever,—nothing to do with it."

MELVILLE RICE (Rec., 1986-1987):

"I was the defendant in the case of *The State v. Melville Rice* that was tried in Birmingham, Ala. * * * Yes, sir, I remember the introduction of a letter in that case signed 'Jack' to 'Dear Judge.' * * * I think the letter was introduced by Mrs. Brown, who took possession of it after it had been read in court. * * * This Mrs. Brown was Mayfield's former wife,—Mrs. Diva Brown. She was present in the court room at the time of that trial, and I believe she did supply Judge Allen with the dope for his cross-examination."

B. M. Allen (Rec., 1905-6):

"I am an attorney-at-law and live in Birmingham. * * * Yes, sir, I remember a case in 1907 tried before Judge Bonner,—at that time it was called the Inferior Court,—entitled *The State v. Melville Rice*. I was attorney for the defendant in that case. * * * I remember what the man was charged with, I think, and what the general line of inquiry was,—he was charged with stealing some syrup, I believe, something of that sort, also some supposedly wonderfully valuable formulas,—I know *I tried to find out what they were*. * * * There was also a lady, who had formerly been *Mrs. Mayfield*, who was *interested in the case*."

J. C. MAYFIELD (Rec., 2436):

"She was after all the information she could get about the 'Koke' formula, or the 'Coca-Cola' formula. I had evaded giving it to her in every way possible. She stated in some of her advertisements and things that she had the original 'Coca-Cola' formula. * * * If I had given her the copy of the formula * * * she would not have appeared in this case, but not having it, and not being able to sell the formula as she wanted to, she appeared in this case and sought all the information possible, and that is why those questions were asked. I evaded them along that line, because they were immaterial and did not have any bearing on the case at issue. * * * At the time of this trial,—April 19th, 1907,—she had not a satisfactory formula. She did, however, after that, in some manner get a satisfactory formula, or, rather, a formula,—I do not know that it is a satisfactory formula,—but a formula that made a good cola beverage. I know she got a lot of it in this particular trial, and, as Rice had stolen my 'Celery-Cola' formula, I have reasons to believe that Rice gave her a copy of the 'Celery-Cola' formula."

Plaintiff then arranges a "deadly parallel," on pages 69 to 78 of its brief, in which, however, there is nothing of any importance in the way of a contradiction. It is true that Mayfield said that Mrs. Diva Brown, his former wife, may have helped him a little, together with his son and Mr. Bloodworth along in '93 up to '94 or '95, and, when asked if she was familiar with the formula that he got from Dr. Pemberton, replied, "Well, I could not answer that,—she had opportunities, helping

around there, to get familiar with it, and what a wife would have with a husband's business;" and it is true that Steve T. Mayfield used the expression, "My mother and John McCowan made 'Koke' at that time." But Mr. J. C. Mayfield goes on to explain (Rec., 2427-2428) :

"I will state this in the way of explanation. There are two formulas; one is a scientific formula—making the extracts, the flavoring, the compound; and the other is a mixing formula, a manufacturing formula. * * * The scientific formula is compounding the essential oils and making the fluid extracts,—as we use now, tea; prior to the Pure Food Law it was the fluid extract of coca leaves,—and making of the other things we needed in an extract form from the crude drugs. When we had the other people to do the manufacturing we would number these things,—No. 5 would mean a certain thing; No. 4 would mean caffeine, or sugar, or flavoring, or extract of some particular thing. That was a mixing formula, manufacturing formula, and the other was a chemical formula, a chemist's. Q.—Did anybody else besides you know the mixing formula? Oh, yes, my sons knew the mixing formula, but they did not know the scientific end of it. Mr. Britton knew the mixing formula."

In other words, Mr. Mayfield was conducting his business then on the same plan as the Koke Company of America now conducts its business. Mr. Mayfield always made the flavoring compound himself, personally, just as the Koke Company of America does today, but he showed numbers of people how to convert this flavoring extract into a syrup by mixing with it sugar, water,

glycerine, etc., in the prescribed proportions, just as the Koke Company of America now shows its various territorial licensees, and some of its bottlers, how to manufacture "Koke" syrup from the concentrated "Koke" compound which it manufactures.

For example, plaintiff's witness, John H. Bohne, who says he formerly "*manufactured*" "Celery-Cola" in St. Louis for the J. C. Mayfield Mfg. Co., there in 1903, says (Rec., 2043-4):

"I held the position of chemist when with Mayfield, and *manufactured* all the syrup. * * * As a chemist, I did all of the *compounding* for Mayfield. * * * I do not know just where the *savor* came from that he used in his 'Celery-Cola,'—*that was the only part that I did not manufacture*,—but I added that according to his instructions. What the formula called for, I did not analyze that. We had it sent up here in five and ten-gallon kegs, and we added that to the 'Celery-Cola,' the *flavor*. * * * Mr. Mayfield turned the formulas over to me, *with the exception of the formula for the flavor.*"

TOM ANDERSON (Colored), plaintiff's witness (Rec., 1914-1915):

"I worked for Mr. Mayfield individually something like three or four weeks, and then I worked for the Celery-Cola Bottling Co. between two and three years. For the last named concern I mixed their drinks and bottled them, both. * * * I made the syrup myself that was used by the Celery-Cola Bottling Co. The *extracts* were *made by someone*

else, and I had to mix the *extracts* with the *syrups* to make up the drinks they wanted."

JOHN T. ENSLEY (plaintiff's witness), who states (Rec., 1901) that he was connected with the Mayfield Mfg. Co. in Birmingham from about 1901 to about 1906, says (Rec., 1904):

"They had their *extract* business away from here part of the time, and manufactured, I believe, in St. Louis and Nashville. * * * They shipped *extracts* from those cities to Birmingham. They had a branch house in St. Louis, I believe, and probably in Nashville. As a matter of fact, *Mr. J. C. Mayfield, Sr.*, made up his *extracts* most any place he was at,—get him a paddle and barrel and mixed up his extracts. He would go about the country and wherever he happened to be he would make up a batch of it, and, as I say, in St. Louis, Birmingham, and Nashville he made extracts."

W. J. CHEEVEIS (plaintiff's witness), in describing the part which the Southern Koke Co., Ltd., took in "making" "Koke," said (Rec., 595-601):

"That was before they began to *make* the drink in New Orleans. Then they began to *make* it here. * * * The product I first knew of, from the time of the organization of the company, the syrup was shipped from St. Louis and was *mixed* on Howard Ave. after the tanks were put up. I never saw the syrup made,—that was made in St. Louis, as I understood,—but it was brought here in barrels and *sugar* added to it. * * * The syrup came in and *they mixed it with sugar*, added the *extract* that they had

received from St. Louis, and added the *glycerine*, and then went ahead.'

J. C. MAYFIELD (Rec., 1668):

"What I considered the key-note of the whole thing was the *flavor*, and the boys always had a gallon or two of *extract*, and it was an easy matter to do the *mixing* of the other things."

That is evidently just what he did in Atlanta, also, when Steve Mayfield says, "My mother and John McCowan *made Koke*." They didn't compound the concentrated flavoring extract, they merely mixed that with syrup, just as Bohne did in the case of "Celery-Cola," and as Tom Anderson did. Of course, being around the plant, Mrs. Diva Brown had an opportunity to see the various packages of drugs and essential oils that were delivered there for Mayfield to use in making up the concentrated compound, and, therefore, to acquire some information as to what the various ingredients were; and, of course, she knew the "mixing formula,"—she knew how much syrup to mix with the flavoring compound, and, in fact, what proportions of sugar, water and glycerine to use in making up the syrup. As Mayfield says, "she had possibly a superficial knowledge of the formula," but "she wanted facts,—the proportional parts," (Rec., 2422) and that is what she didn't know but was trying her best to find out.

Plaintiff argues that Mayfield's statement to the effect that Mrs. Diva Brown didn't know the "Koke" formula cannot be true because "S. T. Mayfield swears

she did," and, hence, that the explanation of the "Dear Judge" letter is unpersuasive. But the vice in this argument is that S. T. Mayfield didn't say that his mother "*knew the formula*,"—what he said was that she and John McCowan "*made Koke*," which meant, of course, that they mixed up the syrup from the concentrated compound, which anybody could do. Why, even a negro, Tom Anderson, was capable of doing that (Rec., 1915).

But it is said that Mrs. Diva Brown sold a formula to Al. Campbell in 1907, which S. T. Mayfield says "was practically the same thing" as the "Koke" formula, and it is argued from this that Mrs. Brown must have known the "Koke" formula all along in order to be able to sell a formula so nearly like it to Al. Campbell. But this argument overlooks the fact that Mrs. Brown did not sell her formula until the latter part of 1907, that the Rice trial took place some time before that, and that Mrs. Brown got a great deal of information from Mayfield's cross-examination in the Rice trial, which undoubtedly enabled her, with the information she already had, to piece together a pretty fair cola drink formula. If it was a cola drink formula at all, it was bound to be "practically the same thing" as the "Koke" formula, because they are all more or less alike, just as all the root beer and sarsaparilla formulas are practically the same. Besides, the formula by which Houppert and Smyly had been theretofore making their "Dope" syrup was practically the same as the Diva Brown formula, except that the latter required the syrup to be boiled,

whereas, the former merely prescribed that it be mixed with cold water in a barrel.

E. J. SMYLY (Rec., 1393-4):

"No particular change was made in the formula, only we changed the way of making it. We used to, at one time, make it out of green syrup, but afterward got to cooking it in a kettle and mixing it in a tank. Mr. Houppert bought a formula from Mrs. Diva Brown. That formula was not very much different from ours. She specified in her formula that we had to cook the syrup,—boil it,—mix it in a mixing tank, where we had been making it in a barrel. * * * The product we made prior to the time of buying this Diva Brown formula, so far as taste is concerned, tasted about the same,—a caffeine drink. The color was the same."

No doubt Mrs. Diva Brown knew how to properly prepare the *syrup*. She had done so for Mayfield years before. But that is a very different thing from knowing the *formula* for making the *concentrated flavoring compound*.

Then plaintiff quotes from the "Rice Record" as follows:

"Q.—Don't you advertise that you know how to make, and do make, 'Coca-Cola'? A.—I do not make it. I advertise the letter that Dr. Pemberton's wife gave me, that I once was associated with her husband in the manufacture of 'Coca-Cola.' Q.—And you knew how to make it before the present

Coca-Cola people got the formulas? A.—I think she stated that to me.”

J. C. MAYFIELD (Rec., 2438):

“The facts are that I did make ‘Coca-Cola’ before the present ‘Coca-Cola’ people bought Dr. Pemberton’s interest, and I had the ‘Coca-Cola’ formula. Mrs. Pemberton gave me that certificate,—certified it before a notary public,—because it was the facts in the case. You call my attention to the fact that in the answer above quoted I used the present tense: ‘I *don’t* make it,’—that is, that I don’t make ‘Coca-Cola’; I meant there that I did not make and label my goods ‘Coca-Cola,’ but I did make the same goods and label it ‘Koke.’ I did not say it there, but that is the facts in the case,—the same goods from the same formula.”

Why, if any one were to ask Mayfield today if he were making “Coca-Cola,” he would tell them, “No,” that he is making “Koke,” but that it is made according to the original formula for “Coca-Cola” that Dr. Pemberton originated, (except for the modification made necessary by the Food & Drugs Act). If he had been representing to the public that he was making “Coca-Cola,” plaintiff would probably have sued him long ago for unfair competition for attempting to sell his goods as its goods.

Then plaintiff parades the following except from the “Rice Record:”

“You claimed that the Coca-Cola people got

Pemberton's formula and that you were entitled to it? A.—No, sir, they bought it from Pemberton. Q.—You have been claiming all the time that you had the 'Coca-Cola' formula? A.—Not the 'Coca-Cola' formula."

Now, these questions were being propounded to Mayfield from the dope supplied by Mrs. Diva Brown, and it is evident that she knew Mayfield had made these claims all along, and that she told Judge Allen so, and got him to ask the questions so as to open the door for an examination into the 'Koke' formula. Rice was charged with *grand*-larceny, and the warrant stated that the value of the "Celery-Cola" formula was somewhere in the neighborhood of several thousand dollars,—at any rate it was of sufficient value to make its theft *grand*-larceny as distinguished from *petty*-larceny. It was stated that the "Celery-Cola" formula was a *secret* formula, hence its enhanced value as a trade secret. Allen adopted in his cross-examination the shrewd theory that, if the formula were not a secret, and if there were other formulas in existence just like it, or similar thereto, then its enhanced value as a secret formula would be exploded, and the grade of the offense would be reduced from *grand*-larceny to *petty*-larceny, with only a nominal punishment. It was upon this theory that the magistrate gave him great latitude in prying into all the details of the "Celery-Cola" formula, and in permitting him to ask all kinds of questions about other similar formulas. Of course, if Mayfield had admitted that he also had the "Koke" formula at that very time, and that it was similar in many respects to the "Celery-Cola" form-

ula, Allen would have immediately launched into a minute cross-examination as to all the details of that formula, under the guise of attempting to show that it was identically the same as the "Celery-Cola" formula, and Mrs. Brown's object would have been accomplished. Mayfield was just sharp enough to sense all this, and so, as he says, in referring to the answers he made to these questions (Rec., 2437):

"I evaded them along that line because they were immaterial and did not have any bearing on the case at issue. As before stated, my property was at stake, and that is why I answered those questions along there as I did."

Under the heading "Manufacture of Koke in Birmingham and Nashville," plaintiff has gotten up another "deadly parallel." In one column plaintiff quotes statements of Mayfield to the effect that the J. C. Mayfield Mfg. Co. bottled all his soda water flavors, including "Koke," in Birmingham, and that in Nashville the same company "manufactured" "Koke." In the other column is an excerpt from Mayfield's testimony in the "Rice Record" in which he made the statement that the J. C. Mayfield Mfg. Co. was doing nothing then but supplying the Celery-Cola Co. with the two specialties, "Celery-Cola" and "Pepsi-Nola," that it was not manufacturing anything at the time but "Celery-Cola," and that the Celery-Cola Co. was not manufacturing anything at the time except the two specialties referred to, although it did other business. In the "Rice Record" Mayfield was speaking specifically of the *corporation*

known as the J. C. Mayfield Mfg. Co., which was incorporated at Nashville, Tenn., and to which the "Celery-Cola" business, formula, and trade-mark had been duly and formally assigned in writing. He had never assigned the "Koke" business to that concern, but had always owned and conducted that business individually, up to the time of the organization of the Koke Company of America. It was so alleged in the answer (Rec., 40), and has been so stated by Mayfield all through his deposition. For instance,—

J. C. MAYFIELD (Rec., 1616):

"After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke Company of America."

And again (Rec., 2423):

"There appears in the 'Rice Record' the following questions and answers: 'Q.—Mr. Mayfield, what business is the J. C. Mayfield Co. engaged in? A.—They have contracts with the Celery-Cola Co. on their specialties. Q.—What specialties? A.—Celery-Cola and Pepsi-Nola.' Those were the only two things the J. C. Mayfield Mfg. Co. had just that time. I individually owned the 'Koke' formula. It was not owned by the J. C. Mayfield Mfg. Co., but by me as an individual."

And again (Rec., 2430-1):

"On pages 24 and 25 of that record appears these

questions and these answers: 'Q.—Mr. Mayfield, what does your company manufacture besides this 'Celery-Cola?' A.—That is all they do. Q.—Does this Celery Cola Co. manufacture anything except Celery Cola? A.—They do other business, but do not manufacture anything else except these two drinks.' The facts are that those two specialties is what they manufactured. The Celery-Cola Co. had a license from the Mayfield Mfg. Co. to manufacture those two specialties. * * * They bought other extracts and manufactured other syrups, and they bought other things and sold them on the market. * * * When I say the Celery-Cola Co. *manufactured* the 'Celery-Cola,' I mean they *mixed the syrup*."

Mayfield was president and principal owner of both the Mayfield Mfg. Co. and the Celery-Cola Co., and he manufactured his "Koke" in the same building which those companies occupied, and carried on his "Koke" business under the trade-name of whichever company's building he happened to be in at the time, and, naturally, in speaking loosely of the matter, he stated that one or the other of those companies manufactured or bottled his "Koke." But of course, in strictness, they did not do so, because they did not own the product or the business. Mayfield just took advantage of their facilities to manufacture and market "Koke."

For example (Rec., 1664):

"After I bought in with Mr. Schuyler in the vinegar business I bought out Ensley & Moody [who had been running the Celery-Cola Bottling Co. prior

thereto in Birmingham] * * * I took over the vinegar business and took over the bottling business, and united them, under the name of J. C. Mayfield Mfg. Co.”

Here it is apparent that he was conducting the vinegar business and the bottling business as an individual under the trade-name of J. C. Mayfield Mfg. Co., and that it was not the Nashville corporation to which he referred at all.

Then plaintiff tries to make out a contradiction by urging that, after Mayfield had stated that the various companies made the various products, he turned around and stated that *he* made all of them personally. Of course, the companies were mere legal entities and could not actually manufacture anything themselves. They had to act through some person as agent, and what Mayfield here stated was that he was that agent who actually did the manufacturing.

J. C. MAYFIELD (Rec., 2431):

“I am asked to state whether at that time the Celery-Cola Co. made the Koke, or whether the J. C. Mayfield Mfg. Co. made it, or who did make it. * * * I manufactured all the stuff,—not only ‘Celery-Cola,’ and ‘Pepsi-Nola,’ *and* (but) manufactured the ‘Koke.’ ”

Under the heading, “Manufacture of Koke in St. Louis and Nashville,” (Plaintiff’s original brief, p. 87),

plaintiff displays some wonderful ingenuity. It quotes from Mayfield's testimony (Rec., 1595) as follows:

"I went to St. Louis to see if I could not organize a company there. It was a bottling company. * * * Maybe I stayed there until 1900, sometime in 1900. Then I went from there to Nashville. I was all the time making 'Celery-Cola' and 'Koke.' "

But where plaintiff has placed the eclipses, plaintiff has omitted the important statement, immediately following the phrase, "It was a bottling company," reading as follows: "and made arrangements to get the goods on the market, *but we did not succeed.*"

Evidently plaintiff was here building up a straw case to be demolished later. It referred to the testimony of Norville N. Leaver (Rec., 2035) and John H. Bohne (Rec., 2041) who were connected with the Celery-Cola Co. of St. Louis, in 1903 and 1904, which concern was operated by Jerome and Mrs. Brooks (Rec., 2445) and which no one pretends ever had any license to deal in "Koke," or ever in fact mixed any "Koke syrup, or handled it in any way), and then triumphantly asserted that, because these two parties never heard of "Koke" during their connection with that concern, therefore Mayfield is "successfully impeached." Plaintiff also "impeaches" Mayfield by the witness M. J. Handley (Rec., 1989), of Nashville, by stating that he was president of the Tennessee Carbonating Supply Co., that this concern had a contract with the J. C. Mayfield Mfg. Co. in Nashville to supply it with two of its products,—

"Celery-Cola" and "Pepsi-Nola,"—and that he never heard of the J. C. Mayfield Mfg. Co. ever selling any product under the name of "Koke." Handley says (Rec., 1990):

"I don't know whether or not the J. C. Mayfield Mfg. Co. was, as a matter of fact, manufacturing a number of different specialties, I couldn't say. We handled 'Celery-Cola,' 'Pepsin-Ola,' and very little 'Vig-O.' Of course, I don't pretend to say positively that the J. C. Mayfield Mfg. Co. was not manufacturing and selling a product by the name 'Koke;' I don't know what they were manufacturing. * * * So far as I knew they may have been manufacturing a product called 'Koke.' * * * Now I want to say another thing,—when we first began the business it was on Market St., and J. C. Mayfield had a laboratory in the rear of the building over there. Now, I noticed him ship the stuff out of there, but I never knew what it was,—put it up in barrels and shipped it away, and I never knew what it was,—put it up in barrels and shipped it away, and I never knew what it was. I couldn't say whether it was 'Koke' or not."

Plaintiff then called several witnesses in an effort to show that "Koke" was not manufactured in Birmingham. The main witness was W. M. Smith (Rec., 1893), and he set the pace for all the others. He said (Rec., 1899):

"I don't consider it dishonorable, or a sign of a lack of integrity, to deliberately falsify."

Evidently he believed in putting his convictions into practice (Rec., 1897) :

“Yes, sir, I beliberately told you a falsehood when you asked me the question, and I confess publicly before the court that I falsified on that occasion.”

This is the pitiful wretch who produced “the little slip with ‘Koke’ printed on it,” which plaintiff has taken the trouble to reproduce on page 93 of its brief, and who testified that Mayfield handed him this slip at the time of speaking to him with reference to being a witness in behalf of defendants in this case. He said on direct examination (Rec., 1894) :

“Yes, sir, on March 4th., or 5th., of this yeas, Mr. J. C. Mayfield, Sr., stopped me on 3rd. Avenue and 20th. St., Birmingham, and asked me to wait a minute. He called me off to one side and said, ‘We are having court up here at the Tutweiler Hotel. I want you to come up there. Maybe you can do me some good. We are bottling a drink called ‘Koke,’ and I know you have seen the stuff that we bottle. All you have to do is to go up there and tell them we have been bottling that stuff.’ He handed me a little slip with ‘Koke’ printed on it. After that he asked me what I was doing then, and I told him I was in the automobile business, but was not working just then. ‘Well,’ he said, ‘maybe after this case is over, perhaps I could give you a job in Louisiana in the bottling plant down there.’ He took down my address and gave me that little slip. This little slip marked Plaintiff’s Rebuttal Exhibit 66 is a slip just like the one that Mr. Mayfield handed me, but I

didn't notice about the number of it. I told Mr. Mayfield I didn't know whether I could go down there or not, but if I could do him any good I would like to if there was any possible chance; I didn't know whether I could or not."

On cross-examination he said (Rec., 1896-7):

"XQ.—Now I will ask you, Mr. Witness, if Mr. Mayfield didn't ask you if you remembered his naming 'Koke' in Birmingham in 1904, 1905, and 1906, and if you didn't make the statement, in the presence of Mr. J. C. Mayfield and W. F. Norman, that you did remember that he made 'Koke,' and if you didn't go on and describe the label with which the product was labeled? A.—Mr. Mayfield asked me to say that. XQ.—On the contrary, didn't Mr. Mayfield ask you whether or not he had made 'Koke'? A.—He asked me, yes, sir. XQ.—If you remembered his making 'Koke'? A.—He asked me did I remember it and I told him yes. XQ.—And you told him yes? A.—Yes. XQ.—And I now ask you whether or not you didn't come into this hotel then,—the Tutweiler Hotel,—in the presence of J. C. Mayfield and W. F. Norman and me,—A. B. Littleton,—and make the statement to me that you remembered his making 'Koke,' and labeling it 'Koke,' and that you washed his 'Koke' bottles, and that your recollection on that was clear, and if you didn't describe the 'Koke' label to me? A.—Yes, sir. XQ.—That statement you now say it untrue? A.—I didn't say it was untrue, I tell you I did say that. XQ.—You told me that was true, that you remembered that at that time? A.—Yes, sir. XQ.—Well, was it a fact, did you remember it, or did you not remember it? A.—I did remember it."

This creature's versatility in downright lying is truly amazing. On his direct examination he said, (Rec., 1894), "I told him [Mayfield] I was in the automobile business, but *was not working just then.*" On cross-examination he said (Rec., 1896): "No, sir, I was not dissatisfied *with the position I had.* I wanted to *change* and go to New Orleans *because I had kin people down there.*" On re-direct examination he said (Rec., 1898): "You say that if I have any statement to make as to why I made the statement, which I now say is false, to Mr. Littleton and the gentlemen he has named, I can go ahead and state it; well, I simply made the statement because *I was out of a position*, and I thought maybe there was a chance for me getting a position,—*I had tried to get a position in town and there wasn't a possible chance.*" On re-cross-examination he said (Rec., 1898-9): "You ask if I would sell my honor and my integrity for a mess of pottage; I don't know exactly whether I would or not. You ask if I didn't state to you on cross examination that I had a job here at the time, and that I was well satisfied with it; *I had a job*, but the job *wasn't paying me enough money.* You ask if I didn't just this minute tell Mr. Hirsch that *I was out of a job and looking for one*; yes, *I was out of a job.* * * * You ask if I didn't just make the statement to you that *the job I had was entirely satisfactory*, and that *I had no reason for making a change* except the fact of *my kin people living in New Orleans*; you ask if I didn't just make that statement; *sure I did.* * * * You ask if I now make the statement that the inducement which impelled me to sacrifice my honor and integrity and to come up here and deliberately

falsify, was to get down to New Orleans to my kin people,—if that's the price I was willing to pay for selling my honor and integrity; no, not exactly. I wasn't undertaking to sell my honor. * * * You ask which, then, is the truth, the fact that I had a job or didn't have one; *i had a job* with the *Jitney Motor Car Co.* You ask which is the truth, that I was satisfied, or not satisfied, with the job; I wasn't satisfied with the money I was getting at my trade of automobile mechanic. The job was satisfactory, all except I wasn't getting enough salary. You ask which one of the statements is true, that I wanted to go to New Orleans *to be with my kin people*, or that I wanted to go there *on account of getting a better job*; I wanted to *get a better job*. You ask if I repeat the statement that I wanted to go to my kin people; I haven't seen them since I was a baby, and don't know anything about them. All I know is they are down there, and that's all. Yes, sir, I would like to go down there to see these people, who are utter strangers to me and who I have never seen in my life, and *that's* the impelling inducement that made me want to leave a fine city like Birmingham and go down to a place like New Orleans." (See J. C. Mayfield, Rec., 2450).

Will Barrow, a gentleman of color, is another hot specimen. He said (Rec., 1925-6):

"I started work for the *J. C. Mayfield Mfg. Co.* in 1906 or 1907, and worked there about a year and a half or two years. * * * Yes, sir, I was working for the *Celery-Cola Bottling Co.* You say you thought I told Mr. Hirsch a moment ago that I was working

for the J. C. Mayfield Mfg. Co.; he was running the Celery-Cola Company on Morris Ave., *so they said*. I was working on Morris Ave. for the *Celery-Cola Co.* Yes, sir, I now say I was working for the *Celery-Cola Co.* at 2116 Morris Ave., and *not* for *J. C. Mayfield*. You ask if I mean to say I don't know the name of the company I was working for; yes, sir, I know it. You ask which one I was working for; I was working for the *J. C. Mayfield Mfg. Co.* You say, then, that I was not working for the Celery-Cola Co.; he was bottling it at the time I worked for him. You again ask which one of these companies I was with; I worked for the *J. C. Mayfield Mfg. Co.* on Morris Ave. * * * You again ask which company I was working for; I was working for the *Celery-Cola Co.*, I suppose. You say that just a minute ago I said I was working for the *J. C. Mayfield Mfg. Co.*; *that's where I was working at.*"

There is no telling where this vagabond did work,—whether for the J. C. Mayfield Mfg. Co., or the Celery-Cola Co., or the Celery-Cola Bottling Co., or for J. C. Mayfield individually. He says he started as bottle washer,—at whichever plant it was,—and later got a job bottling (Rec., 1926). He says, "He was making a lot of drinks there." (Rec., 1927). He says that, besides the soda water, they handled "Hope-Ale," some bitters, and cider and vinegar. (1927). He admits he don't know the brands they put on the cider, or what was on the labels. "I can't remember about them at all," he says. (1927). He can't remember the different brands labeled on the vinegar. As to the soda waters, he says all he can remember are strawberry, lemon, orange phosphate, "Celery-Cola," and "Pepsin-Ola," (1928),

and adds, "I won't say but there was others, but these is what I can remember. There may have been others. That's been a long time ago, and there may have been others that I can't now remember the names of,—yes, sir, that's right, there may have been others." (1928). He admits he can't read or write (1927). He admits that he didn't handle any of the barrel stuff that went out, and that he doesn't know what labels were put on the syrup barrels (Rec., 1930).

S. A. Ellis is another typical witness in this group. He says (Rec., 1843):

"I was connected with J. C. Mayfield, Sr., in the soft drink business in 1902, I believe it was. * * * He was manufacturing drinks of different kinds, I couldn't name all that he handled, I don't know. The concern was called the Celery-Cola Co. You ask what was the name of the syrup he was manufacturing; well, I don't know that he said. He was manufacturing 'Celery-Cola,' syrup, or Cola syrup, I think that was what they called it. * * * 'Celery-Cola' was the principal thing that was being delivered from the wagons. He also had some other drinks, soft drinks of different kinds,—different flavors, you know. I don't recall to mind now the names of any of the others besides 'Celery-Cola.' "

This witness is in a fine position to prove that "Koke" was not manufactured and sold in Birmingham by some one of the various companies in which Mayfield was interested, during his connection with the Celery-Cola Co. ! And he is typical.

L. M. Barclift is another of the same stripe. He says he entered the employ of the J. C. Mayfield Mfg. Co., in 1902 (Rec., 1844), but that he had previously been employed by the O. L. Gregory Vinegar Co. and the Schuyler Vinegar Co., which Mayfield later bought out (1844), and that "I was a vinegar salesman primarily." * * * I had a trade in vinegar and cider, and I was sent out on the road primarily to sell vinegar and cider, that was my business. [If I handled any soft drinks at that time, my main idea was to sell vinegar and cider." (Rec., 1846). It is not apparent just why a vinegar salesman, who spent all his time on the road selling vinegar and cider, should be called to advise the court as to what different soda water brands and flavors were being manufactured and sold in Birmingham by J. C. Mayfield. That this man is another willful perjurer is plain. He says (Rec., 1848):

"Before I came and sat in this chair, I had not talked to any one on this subject,—on this question,—on this case, about what I have been testifying here. No, sir, I have not repeated to anyone, either wholly or in substance, what I have said in this room, nor any part of it. * * * Mr. Bodeker and I were walking up the street, and we talked about several different things,—about Mr. Patton, an officer who used to be here, a friend of mine, getting shot and died. Anything else I talked about had nothing to do with this present matter, except that Mr. Bodeker brought me up here and introduce me."

Then he turned around and admitted (Rec., 1850) that sixty days before that he had received a long distance telephone call in Chattanooga from George H.

Bodeker asking him to come to Birmingham; that he went to Birmingham in response to the call; and that he went to Bodeker's office in the Brown-Marx Building, in Birmingham, and dictated to Bodeker's stenographer a full and complete statement "in regard to this business,—practically the same as you have been asking this morning." He first said that when "she took my statement down, *I don't think there was anyone present but the stenographer, but Mr. Bodeker came in later.*" Then he turned around and admitted that "I believe *Mr. Bodeker asked me the questions in front of the young lady.* You say that I said I made a statement first, and Mr. Bodeker came in later, and you ask if that is what I mean to say; I mean to say that I was there,—*he was there when the young lady took it down,* and then she wrote it off, and I signed it after he left,—he asked me the questions and she took them down in short-hand, and wrote it down and handed it to me and signed it. Mr. Bodeker had gone." (1850). This statement which the witness says he dictated to Bodeker's stenographer is in evidence as Plaintiff's Rebuttal Exhibit 2 (Rec., 1853). In regard to this statement, Barclift was asked: (Rec., 1854):

"You ask, if there is any difference between my testimony and my signed statement, which you shall accept as true; bring me up again,—give me a new chance. Well, what I have testified to here is the truth, as far as I know. There might be a difference in the questions asked me here and in the statement." (Rec., 1854).

DAVID EARLE MOODY (Rec., 1883-5):

"The principal territory I travelled was within a radius of 100 miles of Birmingham. * * * I was constantly on the road during that time. * * * I made a specialty of 'Hope-Ale,' and sold more of that than anything. * * * I had nothing to do with the manufacture of any of these specialties which either the Mayfield Mfg. Co. or the Celery-Cola Co. were getting out. I was merely a salesman, and had nothing to do with the laboratory end of it. I passed through the laboratory occasionally, but not often. I don't know of my own knowledge all the things that were made there, and I don't pretend to testify positively as to everything that was made there. I only know the things given me to sell, and if they made anything else there, any other product under any other name, if it didn't happen to be given to me to sell, why, of course, I didn't know about that."

(B. U. HOPPER, when asked if Mr. Mayfield made any extract or syrup called "Koke," replied (Rec., 1892) :

"It has been so long ago that I don't remember. Of course, he could have made it, and I couldn't say that he didn't make it. * * * He was making a number of these extracts, but 'Celery-Cola' was the thing he was pushing. However, along with that he was making a lot of little extracts and syrups and there was quite a number of them. I couldn't say that I could name them all, at all."

J. T. ENSLEY (Rec., 1904) :

"Yes, sir, he was making a number of extracts, and I don't pretend to remember all the extracts he was making,—I couldn't call all the names. * * * It

is possible he could have made it ['Koke'] without my knowing about it."

Thomas Dixon is a negro. He admits that "I don't know the number of different brands of cola drinks Mr. Mayfield was making and selling at the time. I can't remember whether he was selling two or three or not, because there were different soda wates, you know." (Rec., 1910).

He says he worked for the Mayfield Mfg. Co. about 1902 or 1903 (Rec., 1907), and that "I was the boss of the negroes, and would be after all the negroes who handled the vinegar. I certainly did see that they put the proper labels on it, but I can't remember the name of a single brand of vinegar he put out." (Rec., 1908).

GEORGE E. ANDERSON (colored), says that he worked for the J. C. Mayfield Mfg. Co. from 1902 to 1905, and that during all that time Dixon "was not a superintendent of the colored people there at all." (1918). He says that during the whole of that period Dixon was the drayman (1918).

HOMER BREWER is a negro employe of the Coca-Cola Bottling Co. in Birmingham. He says (Rec., 1912):

"I haven't been talking to anybody about my testimony in this case. No, sir, I never breathed it to a living soul before I entered this room just now. Nobody on earth knew what I was going to testify to until I came into this room and took that chair. No, sir, Mr. Bodeker over there never did see me about it, nor did Mr. Pierce. Nobody at the Coca-Cola

bottling plant ever talked to me about my testimony. Yes, sir, I was in the other room just now. You ask if Mr. Pierce was in there, too; I don't know Mr. Pierce. No, sir, I was not talking about my testimony in this case in the other room. I don't know, sir, how they knew what I knew about it. You ask if they just dreamed it; I don't know, sir, how they knew about it."

He says he worked for the Celery-Cola Co. at one time. "That's all I did around there, just washed bottles, and I don't know anything else that was going on there at all except the bottles I would wash." (Rec., 1913).

TOM ANDERSON, another negro, admits that he only worked for Mr. Mayfield for three or four weeks, when his pay was cut, and thereupon he got a job with the Celery-Cola Bottling Co., (Rec., 1914) which was then owned and operated by Ensley & Moody (Rec., 1917), and which nobody pretends ever bottled "Koke." He also says that Dixon was the drayman and not the negro boss (Rec., 1916).

MACK CRAWFORD, still another negro, was also a drayman. He says (Rec., 1921): "I didn't haul anything but 'Celery-Cola' as I know of. I didn't know no other name but 'Celery-Cola,' that's the only name I know of." (Rec., 1921).

WALTER THOMAS, still another negro, was another one of the draymen. He says (Rec., 1922):

"That's all I ever hauled, 'Pepsin-Ola' and 'Celery-Cola.' I never hauled any of the other products that they made, that's all I know of."

W. J. GARRETT, (Rec., 1985):

"Oh, yes, it is quite possible that he might have made a product 'Koke' and sold it as such. They made a good many different things back there, and he was always a great hand to be experimenting all along."

Finally C. J. Pogue is brought forth in the disguise of an ardent adherent of defendants, forced to take the stand against his will, and confessing with the greatest reluctance the awful wickedness of defendants.

But plaintiff's chief detective, H. B. Pierce, in an unguarded moment, thoroughly exposed this transparent pose. (Rec., 2100-1):

"Bodeker and his detective agency were employed in this case about March 5th., when we were in Birmingham taking the defendants' testimony. Mr. Bodeker was in the room during the taking of defendants' testimony, and that is the time when he was employed. * * * Bodeker was employed in this case to help locate the former employes in Birmingham of the Celery-Cola Co. between the years 1901 and 1910. * * * I couldn't tell you how long C. J. Pogue was assisting Mr. Bodeker. * * * I do not know how much C. J. Pogue was paid for his services in this case on behalf of the Coca-Cola Co. *** I don't know how many times Bodeker had seen Pogue before he was examined in this case. I don't

know what information Pogue gave Bodeker other than the statement he made to him. Bodeker secured a statement from Pogue before the latter went on the stand. Just what that statement was I don't know. * * * I understand that statement was given sometime between March and June."

Thus it is seen that, while Pogue was pretending to be assisting defendants in locating the former employes of Mayfield's various Birmingham companies, he was all the time in the pay of the Coca-Cola Co.,—playing a double game,—and, instead of honestly trying to locate these former employes for defendants, he was doing his best to keep defendants from finding them, and at the same time carroling them for plaintiff. This accounts for the difficulty defendants had in rounding up Mayfield's former employes, and the facility with which plaintiff got hold of them.

The little play Pogue made about not wishing to turn over to plaintiff the packages of letters and documents which he pretended he was compelled to produce in response to a *subpoena duces tecum*, was easy to see through. Pierce admitted that Pogue was in Bodeker's pay, and doing all in his power to assist Bodeker in getting evidence to use against defendants, and it is a safe bet that Bodeker, or plaintiff's counsel, or someone with enough discretion, carefully went through the papers Pogue had before the *subpoena duces tecum* was ever issued, and saw to it that Pogue would not produce any papers that might prove of benefit to the defendants. Under the circumstances, therefore, there is nothing at

all remarkable in the fact that in none of the letters, papers, or documents produced by Pogue did the name "Koke" appear. Plaintiff was too smart to make a slip of that kind. If Pogue had really been acting in the interest of defendants instead of plaintiff, he would have informed Mayfield that he had all these old letters and files at the time defendants were taking their testimony, because he knew defendants were moving heaven and earth to find some of their old "Koke" labels, letter-heads, price-lists, advertisements, etc.

J. C. MAYFIELD (Rec., 2450) :

"Pogue did not mention to me, nor did he intimate to anyone in my presence, that he had these letters which he has produced, or any documents of any kind or character referring to the 'Koke' business, or the 'Celery-Cola' business, or any business in which I was engaged."

But he told the Coca-Cola people that he had them, otherwise they never would have known it, and that explains why it was that defendants could not produce any of these papers, while plaintiff had no difficulty whatever in doing so.

Pogue's refusal to answer the question as to whether or not Mayfield manufactured "Koke" in Birmingham, is so manifestly a by-play that it is ludicrous. Pogue knew perfectly well that defendants knew he knew that Mayfield made and sold "Koke" in Birmingham, and that if he denied knowledge of the fact, he would be prosecuted for perjury, and no doubt convicted, so he

could not afford to answer straight out as plaintiff wished him to; but he made the little by-play referred to in order to convey the impression that if he had answered, his answer would have been detrimental to the defendants, thus seeking to accomplish the same result without any of the attending risk.

Another instance of this kind, showing what an infernal scamp Pogue is, is this (Rec., 1857):

"I was in Birmingham at the time of the trial of the case of *The State v. Melville Rice*. * * * I had a colored fellow I always called 'Dick,' whose name I have been told is James Dixon. I understood that he was arrested about the time of the trial of the case of *The State v. Melville Rice*. I found him in jail, and I suppose he was arrested. You ask if, as a matter fact, I found at his house certain material that came from the Celery-Cola, or the J. C. Mayfield Mfg. Co.; I think Mr. Bodeker found some things in his house which I identified as the property of this company. You ask if I placed those things in his home; well, I object, I refuse to answer that question. I refuse to answer it on the ground,—I refuse to answer it on the ground of *incriminating myself*."

On pages 95 and 96 of plaintiff's brief are quoted extracts from Mayfield's testimony in the Rice case to the effect that the first formula he wrote was the "Celery-Cola" formula, which was eighteen years ago. Mayfield was asked concerning this statement, and replied (Rec., 2427):

"You ask what the facts are with reference to the formula for Celery-Cola and the formula for Koke,—which was the first formula; Koke was the first formula. In response to the question asked me in the Rice Record, if the Celery-Cola formula was the first one that I made, I replied thereto, 'Yes, sir,' because the Celery-Cola formula was the first formula that Dr. Pemberton and I made,—later that I really felt that I made myself. Now I believe I can claim that I made the Celery-Cola formula myself. I do not claim to have made the Koke formula. I had absolutely nothing to do with that. Dr. Pemberton made that,—that is what I bought out."

On pages 109, 110, and 111 of plaintiff's brief appear reproductions of some letters, and the inference is attempted to be drawn,—for what purpose is not apparent,—that "Celery-Cola" at that time had nux vomica, or strychnine, in it. Mr. Mayfield testifies concerning these letters on pages 2440-6 of the record, and completely removes any foundation for the inferences sought to be drawn.

SCHEDULE III.

The Color and Taste of the Drink.

Caramel Coloring.

(a).—Testimony of Defendants' Witnesses.

J. A. BERMUDEZ, a chemist, New Orleans. (Rec., 1496):

"I have known of caramel coloring ever since I have been in the drug business,—since about 1876 or '77. I was with,—in 1876 or '77,—P. L. Quisacks, 37 Royal Street, who used caramel coloring at that time for all soda fountain syrups. Mostly all soda fountain syrups are colored with caramel,—take sarsaparilla, vanilla, banana."

DAMA DIEHL, who has bottled soft drinks for 47 years and who now manufactures "Star-Cola," Nashville. (Rec., 1088):

"Caramel coloring is the least injurious, that is the reason we use caramel coloring. It is sugar."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville. (Rec., 1091-2):

"We color our drink with caramel. It is cheaper than anything else and it is permitted under the law under all of the states without having to put 'Artificially colored. It is not a delterious coloring at all, and it makes a beautiful red colored drink * * *. I do not know of anything else that would take the

place of caramel coloring. My chemist that I had with me for several years never used anything else.

LEE HAGAN, manufacturer of "Ko-Nut" and Afri-Cola," Atlanta. (Rec., 1292):

"I color our drink with caramel coloring. Caramel is cheapest. * * * It is of vegetable origin and stands the acids better than anything we can get."

(b).—Admissions of Plaintiff's Witnesses.

DR. JOHN A. WESENER, Chicago. (Rec., 926):

"Caramel has been in use as a coloring matter for beverages, oh, for a long time, a great many years. I should say it was used prior to the Civil War. Yes, it is now a universal coloring matter which is used extensively for coloring all kinds of drinks. It is one of the oldest coloring matters on the market and is perfectly harmless."

DR. WILLIAM P. HEATH, of the Pratt Laboratory, Atlanta. (Rec., 417):

"Caramel coloring has been in use a long time. It has been in universal use for coloring all kinds of beverages,—not only soda water drinks, but whiskeys, wines and beer and flavoring extracts as long as I can remember. * * * It is the most universally used coloring among the food products. * * * It is absolutely harmless as a coloring matter."

DAVE S. BAUER, a retail druggist, Mobile. (Rec., 544):

"Caramel is recognized as a standard brown coloring matter for syrups, and is in universal use, and was in such use when I was a boy. I am 42 years old and caramel has been used as a coloring for syrups ever since I can remember by every druggist I have come in contact with."

F. M. GREEN, a retail druggist, Atlanta. (Rec., 454):

"Caramel was used at that time (188 and prior thereto) almost universally as a coloring matter for drinks that we wanted to color a brown color. That is the only thing they could color them with and get by with it. I mean by that that caramel would not make a muddy precipitate and things of that kind. Other coloring matter would make a muddy precipitate."

I. L. James, a retail druggist, Atlanta. (Rec., 461):

"I have made root beer myself. * * * We colored it with burnt sugar,—caramel. That material has been in universal use for coloring beverages, and we have used it to color vanilla flavoring."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 379):

"Yes, I think I did handle burnt sugar or caramel coloring. Now, I made many a batch of caramel coloring. In those days [prior to 1886] it was used in the drug business. * * * Yes, I said caramel is a standard coloring matter."

2

Soda Fountain Beverages Same Color as Coca-Cola That Preceded It In the Market.**(a).—Testimony of Defendants' Witnesses.**

ADAM DIEHL, who has bottled soda water for 47 years and who now manufactures "Star-Cola," Nashville (Rec., 1082-3):

"We have been bottling soda water for 47 years. * * * We have been putting out those two drinks, —sarsaparilla and root beer,—for 47 years and both have been the same color all that time. * * * The color of these drinks is a caramel color,—the same color as 'Coca-Cola.' We color those drinks with burnt sugar coloring,—caramel coloring."

J. A. BERMUDEZ, a chemist, New Orleans (Rec., 1496):

"Quisacks get out a preparation which is sold through the fountain as 'Mead.' That is put out by McClasky. That has been on the market here a long time prior to 1877. * * * It is colored with caramel. It cannot be colored with anything else because at that time aniline dies were not known."

PATRICK J. GILLIAN, President of the Crescent City Seltz & Mineral Water Co., New Orleans (Rec., 1501-2):

"The name of our concern is the Crescent City

Seltz & Mineral Water Co. I have been connected with that concern since '76. * * * I know that all the time in the Crescent City Seltz & Mineral Water Co. we bottled sarsaparilla. * * * We colored sarsaparilla with sugar coloring,—caramel coloring. Sarsaparilla coloring should be the same color all the time. * * * It is supposed to be always the same color. I have seen Coca-Cola. It is pretty much the same [color] as the sarsaparilla we made. I have heard that they made sarparailla in 1847,—that was the first factory that was put up here,—but I wasn't in the business at that time. Some of the other beverages that have been colored with caramel coloring since 1868,—well, most any of the colored drinks, they are colored with it, I think."

TOM COLLINS, bartender, Chattanooga Rec., 988):

"I have known the drinks root beer and sarparilla ever since I have been in Chattanooga,—about 28 years. The color of sarparilla and root beer is about the same as Coca-Cola."

JOE QUINN, bartender, Chattanooga (Rec., pp. 991-2):

"I am 40 years old. * * * I have handled root beer and sarparilla. I have known these two drinks all my life. * * * They all have that dark color, I should say between a brownish and black color. I could not distinguish a glass of Coca-Cola from a glass of root beer by the color."

E. W. FREEMAN, bartender, Chattanooga (Rec., 975-978):

"I also handle in my place of business sarsaparilla and root beer. * * * I have known those drinks for years (Rec., 975). * * * I have heard of and handled root beer and sarparilla all the time I have heard of and handled Coca-Cola. I knew of those two drinks, sarsaparilla and root beer, before I ever heard of Coca-Cola. They were the same color at that time as now. (Rec., 978).

F. E. HOOPER, a retail grocer, Chattanooga (Rec., 999):

"Root beer has been on the market a great many years."

A. W. STANLEY, proprietor of the Stag Hotel and Bar, Chattanooga (Rec., 1004):

"I have handled sarparilla and root beer,—how long I cannot tell,—it has been a great many years, though, sarsaparilla. The color of these drinks compared with the color of Coca-Cola,—I guess about the same color."

(b).—Admissions of Plaintiff's Witnesses.

C. G. PETERS, a retail druggist for 28 years, New Orleans (Rec., 655):

"I have handled a lot of these drinks like root beer and sarsaparilla. The coloring matter in root beer is burnt sugar,—what we call caramel. The coloring of sarsaparilla, and root beer, and Coca-Cola, is very much alike. There is no distinction to the ordinary eye. I have been handling sarsaparilla

and root beer for 28 years. I was handling it before I ever handled Coca-Cola,—before I ever heard of Coca-Cola.”

DAVE S. BAUER, a retail druggist, Mobile (Rec., 543-4):

“I have been in the drug business 24 or 25 years, during which time I have been dispensing at my soda fountain root beer and sarsaparilla and drinks of that kind. Sarsaparilla has been on the market to my knowledge since I have been in the drug business and longer,—as long as the Pharmacopoeia has been in existence. I should say it has been in existence 50 years, if not longer. The color of the soda fountain sarsaparilla syrup during this time has varied according to the strength used by each particular dealer,—I might make my sarsaparilla syrup thicker than anybody else’s and mine of course would have a darker color; however, it has all had the same general color, which is brown. I have made sarsaparilla syrup myself, and I have colored it with burnt sugar or caramel coloring. Since I have known sarsaparilla syrup as a soda fountain beverage it has been colored with caramel coloring. Yes, I have also handled root beer for the same number of years. It has been known longer than I have been in business. It has always had that same dark brown color. * * * In general color they [Coca-Cola and sarsaparilla] are alike,—as a matter of fact both have a dark brown color, and so has root beer.”

I. L. JAMES, a retail druggist, Atlanta (Rec., 461-2):

"You ask what other drinks are on the market similar to Coca-Cola in color; well, root beer resembles Coca-Cola in color,—foams a little more,—and sarsaparilla; of course, sarsaparilla and root beer are similar. * * * I do not know what is the difference in color between a glass of root beer and sarsaparilla as served at a soda fountain and a glass of Coca-Cola. Coca-Cola might be a shade lighter, I don't know. It is very hard to tell the difference. I don't think the ordinary customer coming in, if he saw a glass of one and a glass of the other sitting on the counter could tell the difference between them."

F. M. GREEN, a retail druggist for 22 years, Atlanta (Rec., 453-4):

"Root beer and sarsaparilla are colored with caramel. I remember seeing sarsaparilla on the fountain ever since I was a small boy. I am now 42 years of age. I have seen it since I was 10 years old any way,—that is to say, I have seen it on the market for 32 years and it has been substantially the same color during all of that time that it is today. * * * I have made sarsaparilla and root beer myself way back there years ago and I used caramel to color it. * * * I have seen 'Moxie' and that is a deep brown color. * * * It is along the same kind of color [as Coca-Cola]. * * * I have seen 'Moxie' on the market [since] about 1888."

W. L. SAMS, one of plaintiff's traveling salesmen (Rec., 337):

"I have seen root beer when I was 10 years old that had the same color it has today. * * * I have seen sarsaparilla during the time I have been in business of the same color it is today. Yes, I have seen 'Moxie' and it is similar in color to root beer and sarsaparilla."

ALEXANDER CRUICKSHANK, proprietor of cigar store and soda fountain, Atlanta (Rec., 465):

"'Moxie' is a soda fountain beverage."

F. C. PEACE, one of plaintiff's detectives, says he has seen "Moxie" and that it is similar in color to "Coca-Cola." (Rec., 2205-6).

DR. JOHN A. WESENER, a chemist, Chicago (Rec., 926):

"Yes, I think that root beer, sarsaparilla, and 'Moxie' and drinks of that character, were on the market and sold prior to 1886. I could not say whether they were colored with caramel at that time, because I never made any tests at that time, but caramel could have produced the color that they had."

WILLIS E. VENABLE, former manufacturer of "Coca-Cola," and a soda fountain proprietor since 1867 (Rec., 590-1):

"I sold root beer at that time [1887], certainly, —vanilla, lemon, strawberry, sarsaparilla, and probably 50 other different drinks that somebody got out. I cannot remember whether I had been selling this

root beer, and sarsaparilla, and such things, before I heard of Coca-Cola. I don't think I had ever sold any root beer before that, but I sold sarsaparilla. I don't remember whether sarsaparilla was at that time about the same color it is now. I suppose it was,—that is all made about the same color, I think, about, as well as I remember."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 378-9):

"You ask if in my drug business from '84 to '87 I handled any other beverages; * * * we sold liquor and I do not know really what we did sell. * * * We had a syrup called sarsaparilla and put it in the soda fountain. * * * I don't remember that we made it, we may have,—anybody made it so far as I know, sarsaparilla syrup. * * * The color of that sarsaparilla syrup was brown, I think,—yes, I think it was a dark reddish brown."

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co. (Rec., 358) and for 22 years its Secretary (Rec., 353), when asked if there were any other soda fountain beverages of the same color as Coca-Cola at and prior to the time Coca-Cola was first introduced, replied, "I expect there was." (Rec., 361).

In *Chas. E. Hires Co. v. Consumers Co.*, 100 Fed., 809 (C. C. A.-7) it was said that the predecessors of the Chas. E. Hires Company began to make what has since become known as "Hires' Root Beer," in 1877.

In *Moxie Nerve Food Co. v. Maddox*, 152 Fed., 494, it was said that "Moxie" was first placed in the market early in 1885 and that it was a beverage "resembling in color the usual extract of vanilla."

SCHEDULE IV.

DEFENDANTS AND THEIR PREDECESSORS HAVE MADE
AND SOLD SOFT DRINKS EXACTLY LIKE PLAINTIFF'S IN
COLOR, TASTE, AND EVERYTHING ELSE, SINCE 1888.

(a).—The cola drink known as “Koke.”

A. O. MURPHY, of Barnesville, Ga., says that, when the Pemberton Medicine Co. was formed on January 14th, 1888 (Rec., 1287; *defendants' exhibit 22*), Dr. Pemberton conveyed to it the “Coca-Cola” formula and business (Rec., 1280 and that thereafter the partnership manufactured and sold “Coca-Cola” (Rec., 1282). He says:

“The color of that syrup was identical with the color of ‘Coca-Cola’ syrup today, and about the same in taste. * * * The color and taste of that product we were manufacturing then under the name of ‘Coca-Cola’ was the same, as far as I can see, as that now manufactured by the Koke Company and called ‘Koke.’” (Rec., 1282).

Later they changed the name of their “Coca-Cola” to “Yum-Yum,” but the product itself remained the same. (Rec., 1283).

T. C. BANKS, of Newman, Ga., but formerly of Atlanta, the brother-in-law of E. H. Bloodworth, deceased, at whose home Bloodworth lived while in Atlanta (Rec., 408-9), says that the “Coca-Cola” which the Pemberton Medicine Co. manufactured and sold in 1888 “was a dark mahogany. * * * It tasted like the ‘Coca-Cola’

you get now,—practically the same taste (Rec., 1409). He says that later, after the Pemberton Medicine Co. changed the name of its product from "Coca-Cola" to "Koke," the product itself remained the same. "If there was any difference between this preparation they called 'Koke' and the preparation called 'Coca-Cola,' I could not tell it from drinking it and looking at it. It appeared to be the same. It was supposed to be practically the same product, I think, under a different name." (Rec., 1410).

MISS MARION BLOODWORTH, daughter of E. H. Bloodworth, deceased, says, in speaking of the Pemberton Medicine Co., in which her father was a partner (Rec., 1262):

"I used to go down to the place of business every few days. I drank that 'Coca-Cola' they were making. They were making a dark brown red syrup. It tasted like 'Coca-Cola' tastes now and it looked like 'Coca-Cola' (Rec., 1262-3). * * * They made this 'Coca-Cola' three or four months, then they still made it and called it 'Koke.' (Rec., 1263). * * * My father and Mr. Mayfield continued, after Mr. Murphy sold out, for several years,—I think it was four or five or six years. All that time they continued to manufacture and sell this product 'Koke.' " (Rec., 1267).

J. C. MAYFIELD says that, after Pemberton transferred the "Coca-Cola" business to the Pemberton Medicine Co. in January, 1888 (Rec., 1607), "we continued to manufacture and sell 'Coca-Cola' syrup under that name for two or three months." (Rec., 1610). Then

they changed the name to "Koke." (Rec., 1612-13). "The product was no different from the product 'Coca-Cola,'—there was no difference between the product which we thereafter labeled 'Koke,' and 'Coca-Cola.' We continued to manufacture 'Koke' by the same formula that old Dr. Pemberton turned over to us as the 'Coca-Cola' formula." (Rec., 1614).

It is admitted by plaintiff's officers that Mayfield, Murphy, Bloodworth and Pemberton, forming the Pemberton Medicine Co., manufactured and sold a cola beverage in 1888 which had the same color and taste as "Coca-Cola."

ASA G. CANDLER, President of the Coca-Cola Co. (Rec., 382):

"After this transfer April 14th, 1888 * * * they * * * operated the Pemberton Medicine Co.,—that is it, yes. That company's business was manufacturing 'Wine of Coca,' and they undertook to manufacture,—it was a hair dye, and they had 'Globe Flower Cough Syrup' and 'Compound Stillingia,' and shortly after I bought 'Coca-Cola' they started out manufacturing a soda fountain drink which was as near like 'Coca-Cola' in color as they could get it,—that is, a man named Mayfield that was connected with that company,—and called it 'Yum-Yum.' * * * I am not certain whether that was manufactured by the Pemberton Co. or by J. C. Mayfield,—he seemed to be the active man in it; Dr. Pemberton was a sick man at that time. * * * I think Mr. Bloodworth was in it, since you mention it, and Mr. Murphy. Yes, that is right, they were running the Pemberton Medicine Co. * * *

These people,—Mayfield, Bloodworth and Murphy,—were running the Pemberton Medicine Co. for awhile,—I don't think they ran it long,—and they were manufacturing a drink similar to 'Coca-Cola' at that time. (Rec., 383).

F. M. ROBINSON, a stockholder and director of the Coca-Cola Co. and formerly Secretary thereof (Rec., 359-360, 364-5):

"As to the associates who Dr. Pemberton had in the Pemberton Medicine Co., I just remember that a man by the name of Mayfield was one of them and Mr. Bloodworth was another one,—I don't just remember his name now,—Murphy, I guess it was (Rec., 360). * * * They did a medicine and 'extract business. They manufactured these articles that are enumerated there in the Pemberton Chemical business. I think they did manufacture drinks,—colas,—to some extent. (Rec., 359) * * * The only knowledge I have as to whether or not they manufactured any cola syrups was acquired by observation. * * * I don't know anything about the quantities they manufactured or sold, but I know just as well as I know that Hagan & Dodd manufacture 'Ko-Nut,' but I don't know anything about the extent of it."

J. C. MAYFIELD:

"After the retirement of Murphy in June, 1888 (*defendants' exhibit 22*) and the death of Dr. Pemberton that same summer, Mr. Bloodworth and I continued to manufacture and sell 'Koke' until 1895. * * * Then I bought out Mr. Bloodworth (Rec., 1615). * * * After I bought out Mr. E. H. Bloodworth, I continued and continuously manufactured and sold 'Koke' up to the organization of the Koke

Co. of America," (Rec., 1616) whereupon I sold the Koke Co. of America all my interest in the 'Koke' business: * * * The Koke Co. of America has continuously owned the 'Koke' business from its organization down to date. (Rec., 1617). * * * This product 'Koke' has always been the same color from the time we began to make it up to the present time, and had the same taste substantially." (Rec., 1628).

L. A. HOLLEY, formerly of Roanoke, Ala., but now of Atlanta, Ga., visited J. C. Mayfield at his place of business in Atlanta in 1895 or '96 (Rec., 1274). He says:

"He was manufacturing some drinks at that time. I drank some of it. * * * It tasted something like 'Coca-Cola' and it seemed something about the same color as 'Coca-Cola,'—a kind of dark brown color." (Rec., 1275).

H. C. GROVES, a retail druggist for 30 years, Ocala, Fla. (Rec., 1212-13):

"I know J. C. Mayfield. I knew him when I was manager of the store in the spring of '88. I first met him at my store in Ocala, Florida. * * * He was soliciting for cola drinks at that time, trying to sell me cola drinks. The name of that drink was 'Koke,'—'K-o-k-e.' * * * The color of that syrup was a dark brownish. I have seen 'Coca-Cola' syrup. I judge they are just the same,—this 'Koke' and 'Coca-Cola.' I made a drink of it and drank it. * * * It tasted something very similar to the taste of 'Coca-Cola.' I bought some of it at that time. * * * He sent me more after that and I have continued to handle it up to today,—continuously from that time up to today." (Rec., 1213).

GEORGE R. EDMONDSON, proprietor of two drug stores, Atlanta (Rec., 1299):

"I know J. C. Mayfield. I first met him, I guess, in '98 or 1900,—it has been quite a long time ago. When I first met Mr. Mayfield he was here engaged in the manufacture of a soda fountain extract. We bought some extract from him; we bought some of it, I guess, from time to time five or eight months before he left Atlanta, and he went from Atlanta to Birmingham and we got some after he left Atlanta. It was very similar to 'Coca-Cola' in color; we served it like 'Coca-Cola' in seven ounce glasses."

P. B. MCGRAW, a soda water bottler, Gadsden, Ala. (Rec., 1313-14):

"I have been bottling 'Koke' ever since 1900. I purchased it as an extract from J. C. Mayfield right here in Birmingham. * * * Sarsaparilla and 'Koke' are very near the same color."

R. J. BAKER, in the advertising business in Birmingham (Rec., 1302):

"Mayfield, in 1902, when I knew him, was bottling 'Koke' over there in his place of business at 2116 Morris Avenue. I knew him in a business way a good many years. * * * I used to have to go to his place of business to collect on Saturdays, * * * and he would give me a drink of this 'Koke.' It was * * * a syrup just like 'Coca-Cola,'—red like it, tasted like it."

A. S. JOSEPH, of the Alabama Brewing Co., Birmingham (Rec., 1330):

"I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks and ship-

ping 'Hop Ale' then. * * * Owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of a hundred packages of 'Hop Ale,' delivering it and later collecting on it,—which brought me to his place of business sometimes twice a day for a week. * * * I remember he was manufacturing 'Celery-Cola' and 'Koke.' This 'Koke' was a soft drink. It was about the color of all soft drinks,—it seems to me the appearance was about on a par with 'Coca-Cola' and those cola preparations."

E. D. MONTGOMERY, formerly shipping clerk for J. C. Mayfield, Birmingham (Rec., 1356-7, 1363):

"I know J. C. Mayfield. * * * I was with him in 1908 in business, in his employ in 1908. * * * He was making several different drinks. * * * 'Celery-Cola,' 'Pepsi-Nola' * * * 'Creme' and 'Koke.' * * * This stuff 'Koke' that was made down here where I was working for Mr. Mayfield looked like 'Coca-Cola' and tasted like 'Coca-Cola.'"

W. F. BOYLIN, Nashville, who has printed "Koke" labels for J. C. Mayfield since about 1903, says (Rec., 1073-4):

"This 'Koke' was a cola syrup, a cola drink. * * * I have never seen a cola beverage not the same general color. I have never tasted a cola beverage that didn't have the same general taste."

W. M. SIDEBOTTOM, manager of Skalowskie's, Nashville, and who has been in the retail soda water business for 30 years or more (Rec., 1162):

"I knew J. C. Mayfield fifteen or eighteen years ago at Nashville and at St. Louis. He was en-

gaged in manufacturing soda fountain syrups. Among other syrups he was manufacturing was 'Koke.' The taste of this drink from the beverage he was making was similar to all cola drinks. * * * 'The 'Koke' was 'Koke'—a regular cola taste. The color * * * was dark, very much the same as 'Coca-Cola.' " (Rec., 1262-3).

J. B. FREED, soda fountain proprietor and confectioneer for 14 years, Nashville (Rec., 1172):

"I knew J. C. Mayfield about 13 years ago,—first met him in Nashville. * * * He was engaged in manufacturing syrups,—'Celery-Cola' and 'Koke.' We bought from him continuously since I began about 13 years ago. * * * This syrup ['Koke'] has always tasted about the same to me all the time,—I could not see any difference in it. It is somewhere near 'Coca-Cola.' * * * The color of the drink made from this [syrup] is the same thing,—it has always been the same color and similar taste. We are still handling that product, and 'Coca-Cola,' too, and always have during the past 13 years,—have never been without them."

(b).—The cola beverage known as "Celery-Cola."

It is admitted (Plaintiff's brief, pp. 60, 61) that J. C. Mayfield and his successors have continuously manufactured and sold "Celery-Cola" since 1893. Plaintiff says in its brief (p. 60), "In 1893 he put upon the market a drink which was called 'Celery-Cola,' " and then goes on to say that he continued to manufacture and sell this "Celery-Cola" until 1909. As a matter of fact,

"Celery-Cola" is still being manufactured and sold by one of Mayfield's companies,—the J. C. Mayfield Manufacturing Company (Rec., 2446; 860-1).

J. C. MAYFIELD (Rec., 2436):

"Celery-Cola was a caffein drink. * * * It would be classified with the dope drinks."

R. K. SMITH, head dispenser at the United Cigar Stores Company, Nashville (Rec., 1189):

"I think about the first time I heard of 'Celery-Cola' was about nine or ten years ago. It is similar to 'Coca-Cola' in taste and color."

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1073):

"The 'Coca-Cola' and 'Celery-Cola' are like all those cola drinks. I could not tell any difference from the other cola drinks. * * * 'Celery-Cola' resembles all these cola drinks. As compared with 'Coca-Cola,' you could not tell the difference." (Rec., 107.).

W. M. SIDEBOTTOM, manager of Skalowski's, Nashville, says that Mayfield was making "Celery-Cola" in Nashville fifteen or eighteen years ago, and that he was handling it then. (Rec., 1162). He adds (Rec., 1162-3):

"The 'Celery-Cola' was similar to all cola drinks. * * * The color was dark, very much the same as Coca-Cola."

Plaintiff's detective, Frederick Conway Peace, admits that "Celery-Cola" is "similar in color to 'Coca-Cola.'"

(Rec., 2205-6); while plaintiff's chief detective, H. B. Pierce, admits that "Celery-Cola" has "about the same color," and "pretty much the same general taste," as "Coca-Cola." (Rec., 2132).

The manufacture and sale of "Celery-Cola" during the period above indicated is shown by the following of defendants' witnesses:

J. C. Mayfield, (Rec., 1595 et. seq.; 2424);
 J. W. Mayfield, (Rec., 1535 et. seq.);
 S. T. Mayfield, (Rec., 1472 et. seq.);
 J. C. Mayfield, Jr., (Rec., 1565 et. seq.);
 W. F. Boylin, (Rec., 1072);
 Adam Diehl, (Rec., 1085);
 W. M. Sidebottom, (Rec., 1162);
 J. B. Freed, (Rec., 1172);
 F. C. Dorider, (Rec., 1195)
 W. F. Neal, (Rec., 1329);
 A. S. Joseph, (Rec., 1330);
 Mrs. M. L. Edwards, (Rec., 1337);
 H. O. Adams, (Rec., 1343);
 E. D. Montgomery, (Rec., 1357);
 John Smith, (Rec., 1387).

The manufacture and sale of "Celery-Cola" as above shown, is admitted by the following of plaintiff's witnesses:

S. A. Ellis, (Rec., 1843);
 L. M. Barclist, (Rec., 1845);
 C. J. Pogue, (Rec., 1857);
 D. E. Moody, (Rec., 1881);
 B. U. Hopper, (Rec., 1891);
 W. M. Smith, (Rec., 1893);
 J. T. Ensley, (Rec., 1901);

Thomas Dickson, (Rec., 1907);
 Homer Brewer, (Rec., 1912);
 Tom Anderson, (Rec., 1913);
 George Anderson, (Rec., 1917);
 Mack Crawford, (Rec., 1921);
 Walter Thomas, (Rec., 1922);
 Will Barrow, (Rec., 1925);
 John L. Bevel, (Rec., 1930);
 M. J. Handley, (Rec., 1989);
 A. B. Quick, (Rec., 2000);
 A. G. Weber, (Rec., 2001);
 J. W. Huggins, (Rec., 2023);
 Norville N. Leaver, (Rec., 2035);
 John H. Bohne (Rec., 2041);
 Ernest Higgin, (Rec., 2069);
 Henry Hartman, (Rec., 2072).

(c).—The cola beverage known as Wine of Coca.”

It is admitted (Plaintiff's brief p. 61) that J. C. Mayfield also manufactured and sold “Wine of Coca,”—not only the wine tonic, but the soda fountain beverage as well,—and that it was marketed until at least 1909. It is not denied that “Wine of Coca” was similar in color and taste to “Coca-Cola.”

J. C. MAYFIELD says that in 1893 he and his associates decided to market the “Wine of Coca” as a soda fountain beverage. (Rec., 1592-3). “The only thing to leave out was the wine, and put in sugar and water, is my recollection.” (Rec., 1592; 2433-4). “Wine of Coca” was then manufactured and sold for a number

of years, not only in and around Atlanta, but in nearly all the southern states, and as far north as Boston. (Rec., 1593).

In an affidavit made by Mrs. Diva Brown, deceased, (formerly Mrs. J. C. Mayfield), and read into the record in this case by plaintiff (Rec., 1096-7), it is said:

"The Wine of Coca Company, up to eight years ago, sold more goods in some of the southern states than did the Coca-Cola Company, especially in Mississippi, Louisiana, Alabama, and part of Georgia. * * * The Wine of Coca Company is now owned by Boston parties, with headquarters at Boston, Mass."

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola," Atlanta, (Rec., 1292-1296):

"I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups at that time of the nature of 'Coca-Cola,'—'Wine of Coca' was one of them. * * * There were several at that time. * * * 'Wine of Coca' was originally a medicine, but they afterwards put it into syrup form and put it on the market as a soda fountain drink. * * * That has been a long time ago. * * * I knew 'Wine of Coca' before I got into the bottling business; it was a medicine then, and, as a syrup, about twenty years ago. That syrup at that time, [and] the drink made therefrom, was about the same in color and taste as the color and taste of 'Coca-Cola.'"

GEORGE R. EDMONDSON, a retail druggist, Atlanta (Rec., 1301):

"I think years ago,—possibly just after I came to Atlanta,—we sold a little 'Wine of Coca.'"

HENRY BOERGER, proprietor of the Chattanooga Bottling Works, Chattanooga, Tenn. (Rec., 767; 969):

"I have bottled a number of cola drinks,—'Wine of Coca,' 'Gay-Ola,' and Diehl's 'Star Cola.' I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola' (See *defendant's exhibit 4*), and the same as 'Coca-Cola.' * * * The taste of these cola drinks mentioned are very near the same, similar in taste. * * * The 'Wine of Coca' syrup is the same color as Coca-Cola syrup."

F. C. BORIDER knew "Wine of Coca" as a soda fountain drink years ago (Rec., 1195).

C. H. CRIMM, Tennessee manager of the Germania Life Insurance Company of New York, Chattanooga, Tenn. (Rec., 1040):

"I know J. C. Mayfield very well indeed. I first met him in Atlanta. I met him in 1897. At that time he was manufacturing drinks,—'Wine of Coca,' and this other stuff that he had there. * * * He had two drinks besides the 'Wine of Coca.' * * * That 'Wine of Coca' was a drink something similar to the 'Coca-Cola.' It was a syrup he was manufacturing. The other drink I speak of was a similar drink. * * * There was not much difference in taste. The color of those drinks at that time was brown,—similar to the color of 'Coca-Cola.'"

(d).—The cola beverage known as “Pepsi-Nola.”

It is also admitted that J. C. Mayfield manufactured and sold “Pepsi-Nola” from about 1903 to 1909. (Plaintiff’s brief p. 61).

This “Pepsi-Nola” was still another cola drink, only it had a slight pepsin flavor.

J. C. MAYFIELD (Rec., 2438):

“The two distinct differences between ‘Celery-Cola’ and ‘Pepsi-Nola’ are that ‘Pepsi-Nola’ had present in it pepsin, and ‘Celery-Cola’ had celery in it. That is the two distinct differences. * * * ‘Pepsi-Nola’ was a cola beverage.”

The manufacture and sale of “Pepsi-Nola” from 1903 to 1909 is shown by the following, among others, of defendants’ witnesses:

J. C. Mayfield, (Rec., 1599);

J. W. Mayfield, (Rec., 1535 et seq.);

S. T. Mayfield, Rec., 1474 et seq.);

E. D. Montgomery, (Rec., 1367);

and is admitted by the following of plaintiff’s witnesses:

J. T. Ensley, (Rec., 1901);

Walter Thomas, (Rec., 1922);

D. E. Moody, (Rec., 1884);

C. J. Pogue, (Rec., 1861);

W. M. Smith, (Rec., 1893);

Thomas Dickson, (Rec., 1907);

George E. Anderson, (Rec., 1917);

Will Barrow, (Rec., 1925);

John L. Bevel, (Rec., 1930);

M. J. Handley, (Rec., 1989).

**Beverages Manufactured by Others, Having
the Same Color and Taste as "Coca-Cola,"
Which Have Been on the Market
For Years.**

(a).—"Star-Cola,"—since 1900.

ADAM DIEHL (Rec., 1083; 1085):

"We manufacture a cola drink,—'Star-Cola.' We have been putting out that drink for about fifteen years. * * * I put 'Star-Cola' on the market for the first time about fifteen years ago. There were eight or ten, or fifteen cola products at that time."

(b).—"Afri-Cola,"—since 1899.

LEE HAGAN (Rec., 1292, 1296):

"I got into the 'Afri-Cola' sixteen years ago. * * * I think Mr. Asa G. Candler, the president of the Coca-Cola Company, knows that I am in business here. I expect he has known it as long as I have, so far as I know. He has known over all that time all the time I have been making and selling these cola beverages, that I have been in that business of making them. He has never sued our company or taken any steps to oppose our right to manufacture our products and sell them. The Coca-Cola Company has never taken any steps against our company to contest our right to manufacture our syrup in the way we do, and sell it in the way we do."

ASA G. CANDLER (Rec., 383-4):

"Oh, yes, there is a drink called 'Afri-Cola.' I have heard of it frequently. Yes, sir; I think I have

seen it,—I know I have. It is about as near the color of 'Coca-Cola' as they could get it. * * * Yes, sir; there is a 'Ko-Nut,'—that is run by the same gang, I think. * * * I understand Hagan & Dodd make 'Afri-Cola' and 'Ko-Nut.' I think they have been making it ten or twelve years."

F. M. ROBINSON (Rec., 361-2):

"I know there is such a firm as Hagan & Dodd in Atlanta, but I am not personally acquainted with them. * * * I have known this firm, I expect, about ten years or a dozen years, maybe more, I don't remember. I see by the papers they are making a product called 'Ko-Nut.' * * * Yes, sir; to make a guess, I have seen Hagan & Dodd's advertising,—their 'Ko-Nut' or 'Afri-Cola,'—about ten or a dozen years. It has been a good while. During all of that time I was secretary of the Coca-Cola Company."

MR. HIRSCH, General Counsel for the Coca-Cola Company, (Rec., 1296):

"We admit on the part of the Coca-Cola Company that Mr. Lee Hagan has been in business as long as he says he has been in business, and that it was known by the Coca-Cola Company that he had been in that business."

(c).—"Dixie"—since 1898.

LEE HAGAN (Rec., 1291):

"I made a similar product of that character before I began making this 'Ko-Nut' and 'Afri-Cola,' called 'Dixie.'"

(d).—"Dope,"—(Atlanta), since at least 1903.

LEE HAGAN (Rec., 1294):

"There was a concern here in Atlanta that used to put out a product under the name of 'Dope.' The name of that concern was Dope Company. I think they labeled their bottles 'Dope.' They advertised their product in Atlanta. * * * It was a caffein drink,—one of these cola drinks. It was similar in color and taste to Coca-Cola. This concern in Atlanta put out these goods under the name of 'Dope' twelve years ago, to the best of my recollection."

E. A. SHARP, a retail druggist, Jacksonville, Florida (Rec., 1255):

"I have always heard there was a 'Dope,' as far as that is concerned, which was different from 'Coca-Cola.' I first seen it advertised right in Atlanta twelve years ago."

GEORGE J. MARTIN, one of plaintiff's traveling salesmen (Rec., 340-1):

"I heard it rumored years ago—it has been twelve years ago,—here in Atlanta, Georgia, a thing came out and they called it 'Dope.'"

(e).—"Dope"—(Birmingham), since 1902.

A. E. CAMPBELL (Rec., 1363-4; *Defendants' Exhibits 24 to 27, inclusive*):

"In 1902 I was steward of the Southern Club and

purchasing agent for the bar and cafe, and I put in the Houppert & Worcester products. At that time they had aerated waters,—Wauseka Waters,—and aerated waters, soda, sarsaparilla, and a product they called 'Dope.' I bought that 'Dope.' I continued to buy it continuously while I was steward of the Club, and afterwards, upon starting a business of mine, I continued to handle their goods. * * * *Defendants' Exhibit 24* is a bill-of-sale between Houppert and Worcester, where Worcester sold his interest in the bottling plant. * * * Houppert sold Worcester's interest to Smyly, E. J. Smyly. Smyly and Houppert sold their interest to the National Dope Company. That was a corporation. The National Dope Company continued business quite a while, and then I think it was in 1911 the business was transferred to the Birmingham Bottling Company. * * * After that the Birmingham Bottling Company sold that copyright (trade-mark registration of the word 'Dope' in the Patent Office, *Defendants' Exhibits 26 and 27*), to Mayfield & Mayfield."

E. J. SMYLY (Rec., 1392):

"I am bottling soda waters and 'Dope' and almost all kinds of aerated waters. * * * That 'Dope' comes under the head of caffein drinks,—a cola beverage. I have known of that product, 'Dope,' to the best of my recollection, about fifteen years,—when I was working for Houppert & Worcester. * * * I acquired an interest in making and selling that syrup in 1905. * * * Houppert & Worcester dissolved partnership. Houppert took the business. Worcester sold out to him. I bought a half interest from Houppert. * * * When we first went into business together it was

known as 'Houpper & Smyly, Birmingham Bottling Works.' We stayed in partnership until we organized the National Dope Company, and we continuously made this product up to that time. After we organized the National Dope Company, the business, good will, etc., was transferred to that company. * * * We continued under the name of National Dope Company until sometime in January,—the latter part of January, 1911. After that we reorganized and incorporated under the name of Birmingham Bottling Company. The Birmingham Bottling Company manufactured and sold this syrup after that. After that we sold the rights * * * to Mayfield & Mayfield."

J. C. MAYFIELD, Sr., Rec., 1620):

"*Defendants' Exhibit 28* is an assignment from the Birmingham Bottling Works to Mayfield & Mayfield of the trade-mark 'Dope' and the business and good will connected therewith, dated May 6th, 1913. *Defendants' Exhibit 32* is a bill-of-sale and assignment of the trade-mark 'Dope' and the business and good will connected therewith, from Steve T. Mayfield and James C. Mayfield, doing business as Mayfield & Mayfield, to the Koke Company of America, dated the 26th of December, 1913. This is my signature. After the assignment of this 'Dope' to the Koke Company of America, the Koke Company of America, through its agents, licensees, began and continued to sell 'Dope' continuously. * * * They have continued up to the present time."

(f).—"Koke,"(Murfreesboro, Tenn.), — since 1902; "Nerve-Ola,"—since prior to 1902.

J. W. HUGGINS, a "Coca-Cola" bottler, who formerly bottled a cola beverage to which he applied the name "Koke" (Rec., 2012-13):

"I swore in my application for registration of the word 'Koke' that the trade-mark 'Koke' had been used continuously in our business since about May 1st, 1902, and I think that is about true. * * * The first product we bottled and labeled 'Koke' was, I think, 'Nerve-Ola,' but we have bottled several different things that we branded 'Koke,'—several of these different cola drinks. What we got from the 'Nerve-Ola' people was the completed syrup. It looked and tasted pretty much like 'Coca-Cola.' We took that product and bottled it and labeled it 'Koke.' Then we manufactured a syrup that we labeled 'Koke' that we made from a formula that we were trying to reproduce 'Coca-Cola.' We got that formula from somebody, I think, in Florida. * * * We made that product ourselves from the formula that we got. * * * Then we had Wampole try to make us up some syrup by this formula,—Wampole, of Philadelphia. This syrup that we made we percolated the coca leaves and got the extract out of it. * * * We put caffein in. * * * We used to buy from H. K. Wampole & Company of Philadelphia, I believe, in syrup form by the barrel, a syrup that they called 'Nerve-Ola,' which we used more than anything else, and then we ourselves mixed the syrups that we used this name [Koke] on. (Rec., 2007). * * * We sold 'Koke' from 1902 up to 1909 (Rec., 2017). * * * Ultimately a deal was consummated whereby Christy & Huggins and the Murfreesboro Bottling Works sold to Mayfield, or his company, this registered trade-mark 'Koke.'" (Rec., 2008; see *Defendants' Exhibits 67 and 129.*)... See also S. B.

'Christ, the partner of J. W. Huggins. (Rec., 2027-8-9).

(g).—"Koke,"—(Texas) since 1905.

J. G. PYLE (Rec., 1724):

"The first time I ever heard the word 'Koke,' I was in West Texas,—I think it was about 1904, at Albany, Texas, and I went and asked for 'Coca-Cola.' They said 'We have not got Coca-Cola.' I said, 'What have you got?' He said, 'Koke.' I said, 'What is Koke?' He said, 'Well, it is something similar to Coca-Cola. I asked him to give me a 'Koke,' and he drew a 'Koke.' * * * They drew the 'Koke' out of a keg, a five gallon keg. He told me at the time where it came from. He said it is made over there at some small town, maybe Cisco, something like that."

(h).—"Cola-Ade,"—since 1898.

F. C. DORIDER (Rec., 1196-1198):

"We began handling 'Cola-Ade' I think about eight or nine years ago. * * * We sold a good deal of 'Cola-Ade' for awhile. * * * 'Cola-Ade' is made in Atlanta, I think. I don't know whether anybody knew about 'Cola-Ade,' or not. We knew it and advertised it,—stenciled it in our floor."

W. M. SIDEBOTTOM (Rec., 1163):

"There are a great many cola drinks on the market,—the 'Celery-Cola,' 'Star-Cola,' 'Cola-Ade.' I have known cola drinks on the market, to my best

recollection, twenty-five or twenty-eight years, I guess."

R. W. BROWN (Plaintiff's Witness), (Rec., 682):

"There is a bunch of drinks on the market similar to 'Coca-Cola.' I don't recollect the names of all of them, but there are quite a number of them. I think there is one called 'Cola-Ade.'"

**(i).—"Queen-Ola," "Rye-Ola," "Wise-Ola,"
"Ale-Cola,"—since 1903.**

D. E. MOODY, plaintiff's witness (Rec., 1881; 1887):

"I got acquainted with Mr. J. C. Mayfield, Sr., about the latter part of 1903 or the first part of 1904. I bought a third interest in the bottling works on Powell Avenue and 20th Street in the latter part of 1903, and Mr. Mayfield shortly after that visited that place and I got acquainted with him. B. U. Hopper and John T. Ensley, were interested with me in that bottling plant. We called it the Celery-Cola Company. * * * You ask how many cola drinks there were on the market in Birmingham at the time I was in the bottling business and with the Celery-Cola Bottling Company; why, at that time Mr. Peck was manufacturing a drink over here which he called 'Rye-Ola,' and there was a 'Wise-Ola' bottling plant,—those two are the only ones that I remember, at that time. * * * Yes, sir; I remember about 'Ala-Cola' also, and there was one at Bessemer,—I had forgotten about that. * * * I have been making a drink I call 'Queen-Ola' up

to last fall. I have been making it some three or four years. Yes, sir; that is a syrup for making a soda fountain beverage. * * * I color it artificially with caramel. * * * You ask if I think a casual purchaser could tell the difference between my product and 'Coca-Cola' by the color; well, mine is a good deal darker, almost as dark as root beer. (The witness was asked if he could tell the difference between a glass of his product, 'Queen-Ola,' poured into a glass, and a glass, say, of 'Rye-Ola,' but he did not answer the question.) You ask why I colored my drink with caramel; most of these drinks are colored that way. (Rec., 1946). * * * You ask why I colored it that color instead of pink, or green, or some other color; it's just customary for it to be colored that way. I could not tell you whether or not anybody that bottles a drink like that colors it that way. You ask if I have ever seen a drink of that sort that was not that same color; there are some darker than others, but they are all about the same general color, oh, yes." (Rec., 1947). See, also, H. O. Adams, Rec., 1344.

(j).—"Lime Juice & Cola,"—since 1905.

EDWARD T. LANGAN, plaintiff's witness (Rec., 896):

"I have dispensed 'Lime Juice & Cola' and 'Cola-Mint.' * * * That has been on the fountain right along for the last ten years. Yes, sir; it is the same color as 'Coca-Cola.' I have handled it and know that it has been on the market for the last ten years. It is made by Parke-Davis & Co., at Detroit."

(k).—"Dr. Pepper,"—since 1897.

J. M. PENLAND, (Plaintiff's Witness) of Waco, Texas, (Rec., 1983):

"The drink known as 'Dr. Pepper' is still being sold in Waco. I don't know how long it has been on the market, but I have known it fifteen or eighteen years."

JACOB SCHRODT, a retail druggist, Dallas, Texas, (Plaintiff's witness), Rec., 743):

"'Dr. Pepper' is a soda fountain beverage, and is a syrup like 'Coca-Cola.'"

C. J. THORNTON, a retail druggist, Hattiesburg Miss., (Rec., 1760):

"I have heard people call for 'dope' ever since there has been a cola on the market. I have heard 'Dr. Pepper' called 'dope.' * * * I used to drink it and I called for it as 'dope.' It is supposed to be good for headache. * * * Take 'Dr. Pepper,' that is the first I ever heard called 'dope.' * * * About eighteen years ago I called for 'dope' and got a drink of 'Dr. Pepper.' (Rec., 1767). The first time, eighteen years ago, was 'Dr. Pepper,' was the first I ever called 'dope.'"

W. A. HICKMAN, Monticello, Miss., (Rec., 1828):

"I handle 'Dr. Pepper' at our soda fountain."

(1).—"Orin-Cola,"—since 1904.

NORVILLE N. LEAVER, (Plaintiff's witness),
(Rec., 2036) :

"I am a manufacturer of soft drinks. * * * I put out a drink known as 'Orin-Cola.' That is a drink something similar to 'Coca-Cola.' * * * It looks like 'Coca-Cola.' It is colored the same as 'Coca-Cola.' * * * I have been making this drink since March 1st, 1904. * * * I don't know why I color this particular drink the color it is,—except it is the custom from experience, when people ask for lemon soda you have to have a white soda, and if they ask for sarsaparilla it is black; if they ask for 'Dr. Pepper' it is black; and we color that for that simple reason, I suppose. I give it the flavor it has because people like a flavor of that kind."

JOHN H. BOHNE, (Rec., 2045) :

"After I left Mayfield I went in partnership with him [Norville N. Leaver] in 1904 in the manufacture and sale of a drink called 'Orin-Cola.' * * * The color of 'Orin-Cola' was a brown color like the usual cola drinks. Most all of the cola drinks that I ever saw are about the same color. I never saw any difference in them so far as the color is concerned. Burnt sugar produces that color."

SCHEDULE V.

Drinks Now on the Market Having Same Color and Taste as Coca-Cola.

1.

Physical Exhibits.

The best evidence of the drinks now on the market having the same color and taste as "Coca-Cola" are the drinks themselves. Bottles containing a few of the many drinks of this character, which were purchased in the open market at the time the testimony in this case was being taken, were placed in evidence so the court could see for itself just what these drinks look and taste like.

In the tabulation below the first column shows the exhibit number, the second the name of the drink, the third the place where purchased, the fourth the date of purchase, the fifth by whom purchased or identified, and the sixth the page of the record where the exhibit is identified:

1	2	3	4	5	6
Deft's.		Chatta. Bot.		Henry	
Ex. 1.....	Koke	Works	2-11-15	Boerger	968
Defts'.	Tru-	Union Bot.		R. F. Zimmer-	
Ex. 2.....	Cola	Works	2-11-15	man	979-80
					1090
Defts'.	Fletcher's			John D.	(Orig.
Ex. 3.....	Cola	Nashville	2-17-15	Fletcher	Tr. 440)
					1084
Defts'.	Star-	Diehl & Lord,			(Orig.
Ex. 4.....	Cola	Nashville	2-17-15	Stipulation	Tr. 807)
Defts'.	Coca-	Open Market,			(Orig.
Ex. 6.....	Cola	Nashville	2-17-15	Stipulation	Tr. 807)
		Crockett			

Defts'. Ex. 43.....	Star-Cola	Cafe, Nashville	J. W. 11-30-14 Mayfield	1523
Defts'. Ex. 44.....	Star-Cola	W. P. Watsn, Nashville	J. W. 11-30-14 Mayfield	1523
Defts'. Ex. 45.....	Star-Cola	Harry Seidell, Nashville	J. W. 11-30-14 Mayfield	1523
Defts'. Ex. 46.....	Cola-Nip	Peel's Bar, Birmingham	J. W. 12-16-14 Mayfield	1523
Defts'. Ex. 47.....	Cola-Nip	Mecca Hotel Bar, Birmingham	J. W. 12-16-14 Mayfield	1524
Defts'. Ex. 48.....	Cherro-Cola	Svibone, Bessemer, Ala. Simp. Bervin Grocery Store, Bessemer,	J. W. 12-16-14 Mayfield	1524
Defts'. Ex. 49.....	Rye-Ola	Ala.	J. W. 12-16-14 Mayfield	1524
Defts'. Ex. 50.....	Gerst's-Cola	Jesse Call's, Nashville	J. W. 11-13-14 Mayfield	1524
Defts'. Ex. 51.....	Kola-Rex	Reliance Bar, Birmingham	J. W. 12-17-14 Mayfield	1524
Defts'. Ex. 52.....	Dope	W. L. Del- heim's, Birmingham	J. W. 12-17-14 Mayfield	1524
Defts'. Ex. 53.....	Co-Co.	Johnson Bros., Birmingham	J. W. 12-17-14 Mayfield	1524
Defts'. Ex. 54.....	Star-Cola	Charles, Nashville	J. W. 11-30-14 Mayfield	1524
Plff's. Rebuttal Ex. 69.....	Dope	Florence Bar, Birmingham	M. D. Ziegler 2-26-15 (Frank Clapp,	1932 2182
Plff's. Rebuttal Ex. 73.....	Misty-Cola	Terminal Bar, Birmingham	Frank Clapp 3-15-15 M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex. 74.....	Cola-Mint	Woodward Bar, Birmingham	Frank Clapp 3-15-15 M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex. 76.....	.....	Morris Hotel Bar	Frank Clapp 3-15-15 M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex. 77.....	.....	Morris Hotel Bar	Frank Clapp 3-26-15 M. D. Ziegler	2181 1923
Plff's. Rebuttal Ex. 125.....	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them.....	Dr. H. B. Fuller .....	.....	2267
Plff's. Rebuttal Ex. 126.....	Said to be other than Coca-Cola, purchased by plaintiff's detectives, and sent in by them.....	Dr. H. B. Fuller .....	.....	2267

Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 127	and sent in by them.....Fuller	2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 128	and sent in by them.....Fuller	2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 129	and sent in by them.....Fuller	2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 130	and sent in by them.....Fuller	2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 131	and sent in by them.....Fuller	2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 132	and sent in by them.....Fuller	2267
Plff's.	Said to be other than Coca-Cola,	
Rebuttal	purchased by plaintiff's detectives, Dr. H. B.	
Ex. 133	and sent in by them.....Fuller	2267
Plff's.		
Rebuttal	Dr. H. B.	
Ex. 134	Said to be Coca-Cola.....Fuller	2267

2

Testimony of Defendants' Witnesses.**(a).—Manufacturers.**

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1641):

"There are a great many other cola beverages besides our 'Koke' and 'Dope' on the market to-day to my knowledge. I know of quite a number, and have heard of at least a couple of hundred. I can enumerate some. There is 'Wine-Coca,' 'Ala-Cola,' 'Wise-Ola,' 'Afri-Cola,' 'Ko-Nut,' 'Coca-Nola,' 'Pepsi-Cola,' 'Lemon-Cola,' 'Chero-Cola,' 'Nifty-Cola,' 'True-Cola,' and 'Cola-Nip,' 'Star-Cola,' 'Diehl's Cola—no, not Diehl's Cola, 'Perst's Cola'—and 'Mar-Cola,' 'Farri-Cola,' 'Ala-Cola,' 'Mint-Cola,' 'Lime-Cola,'—or 'Lime-Ola,' I do not know which. 'Wine of Coca' was a soda fountain syrup since 1893. All these different beverages I have mentioned are of the same color. Some of them have a little different taste. It is a pretty hard matter, but, of course, the different goods—the same pieces of goods will vary in flavor, but you might say they are all uniform flavor,—some little variation on account of age, maybe. The color of all these beverages is about the same as our product 'Koke' and 'Dope.' I never saw a cola beverage that was not the same general color, or the same general taste."

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks, and manufacturers of "Star-Cola," Nashville (Rec., 1084-5):

"There are forty or fifty other cola drinks on the market to-day that I know of—I could not mention them all. I have known of cola drinks on the market I suppose twenty-five years. They are all about the same color as 'Coca-Cola.' All cola drinks have the same taste. (Rec., 1084). * * * I have never seen a cola product not the same general color as these I have spoken of. I have never tasted one not the same general taste as ours." (Rec., 1085).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1092-3):

"I know of others on the market,—cola beverages,—probably a dozen or more. They are of the same color as 'Coca-Cola,' all that I ever saw. They are similar in taste to 'Cola-Cola.' They all have pretty much the same general taste. We color our drink with caramel. (Rec., 1092). * * * I have never seen a cola beverage not the same general color, I have never tasted one not the same general taste, as 'Coca-Cola.' My beverage is similar to it. Those bottles, the color and taste of the drink, are common to the trade." (Rec., 1093).

LEE HAGAN, president of The Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1291-2):

"The color of 'Ko-Nut' syrup is similar to 'Coca-Cola' and the other cola beverages on the market. I have made a similar product, of that character, before I began making this 'Ko-Nut' and 'Afri-Cola,' called 'Dixie.' (Rec., 1291). * * * I can not say how many caffeine preparations there are on the market

at the present time, except I know there are a good many of them. There is several right around this locality, such as 'Chero-Cola,' 'Gay-Ola,' 'Rye-Ola,' 'Tru-Cola,' 'My-Coca,' 'Joy-Ola,' 'Glee-Ola' * * * 'Mo-Ola,' * * * 'Ala-Cola,' 'Uncle Sam.' I have known of cola drinks—these caffeine drinks,—not counting 'Coca-Cola,'—for about sixteen years. I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups on the market of the nature of 'Coca-Cola,'—'Wine of Coca' was one of them, and I have forgotten what the others were; there were several at that time. 'Wine of Coca' was originally a medicine, but they afterwards made it into syrup form and put it on the market as a soda fountain drink. * * * I have never seen a cola drink that was not of the same general color as our product and 'Coca-Cola' are to-day. They are all colored with caramel coloring. * * * I color our product with caramel coloring." (Rec., 1092).

(b).—Bottlers.

HENRY BOERGER, president of the Chattanooga Bottling Workers, Chattanooga, who has been bottling soda water for 26 years (Rec., 967, 969-70) Chattanooga, Tenn.:

"During that time I have bottled a good many different flavors,—lemon, strawberry, ginger ale, and all the different kinds of soft drinks. I have bottled a number of cola drinks,—'Wine of Coca,' 'Gay-Ola,' and Diehl's 'Star-Cola.' I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola,' and the same as 'Coca-Cola.' 'Gay-Ola'

is the same color. The taste of these cola drinks mentioned are all very near the same, similar in taste. (Rec., 967). * * * I have known other drinks on the market similar in color, taste, and appearance to 'Coca-Cola' for about ten or eleven years. (Rec., 968) * * * The color of the syrup of 'Gay-Ola' is similar to 'Coca-Cola' syrup. The color of 'Star-Cola' syrup is the same color as 'Coca-Cola' syrup. The 'Wine of Coca' syrup is the same color as 'Coca-Cola' syrup. I have never seen any syrup for a cola beverage that was not that same color. I have never seen a cola beverage on the market that was not substantially the same color as 'Coca-Cola.' * * * There are hundreds of cola beverages on the market. Besides those I have mentioned are 'Afri-Cola' and 'Ala-Cola.' 'Afri-Cola' has been on the market ten or eleven years." (Rec., 969-70).

R. F. ZIMMERMAN, proprietor of the Union Bottling Co., Chattanooga, Tenn., which bottles "True-Cola" (Rec., 978-81):

"I have bottled cola drinks. (Rec., 978) * * * When I first went in business I bottled a cola drink that I made myself, practically five years ago. * * * It compared with the color of 'Coca-Cola' in that it was colored with burnt sugar,—practically the same color. I could not distinguish one from the other, and the tastes were very much alike—the ingredients were almost the same as the original 'Coca-Cola' of to-day. (Rec., 979) * * * I have been bottling the drink in Exhibit No. 2, ['Tru-Cola'] nearly four years, also sarsaparilla and root beer. * * * I have known the drinks sarsaparilla and root beer since '91—twenty-five years ago, or more. The color of root beer and sarsaparilla that I knew at

2

Testimony of Defendants' Witnesses.**(a).—Manufacturers.**

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1641):

"There are a great many other cola beverages besides our 'Koke' and 'Dope' on the market to-day to my knowledge. I know of quite a number, and have heard of at least a couple of hundred. I can enumerate some. There is 'Wine-Coca,' 'Ala-Cola,' 'Wise-Ola,' 'Afri-Cola,' 'Ko-Nut,' 'Coca-Nola,' 'Pepsi-Cola,' 'Lemon-Cola,' 'Chero-Cola,' 'Nifty-Cola,' 'True-Cola,' and 'Cola-Nip,' 'Star-Cola,' 'Diehl's Cola—no, not Diehl's Cola, 'Perst's Cola'—and 'Mar-Cola,' 'Farri-Cola,' 'Ala-Cola,' 'Mint-Cola,' 'Lime-Cola,'—or 'Lime-Ola,' I do not know which. 'Wine of Coca' was a soda fountain syrup since 1893. All these different beverages I have mentioned are of the same color. Some of them have a little different taste. It is a pretty hard matter, but, of course, the different goods—the same pieces of goods will vary in flavor, but you might say they are all uniform flavor,—some little variation on account of age, maybe. The color of all these beverages is about the same as our product 'Koke' and 'Dope.' I never saw a cola beverage that was not the same general color, or the same general taste."

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks, and manufacturers of "Star-Cola," Nashville (Rec., 1084-5):

"There are forty or fifty other cola drinks on the market to-day that I know of—I could not mention them all. I have known of cola drinks on the market I suppose twenty-five years. They are all about the same color as 'Coca-Cola.' All cola drinks have the same taste. (Rec., 1084). * * * I have never seen a cola product not the same general color as these I have spoken of. I have never tasted one not the same general taste as ours." (Rec., 1085).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1092-3):

"I know of others on the market,—cola beverages,—probably a dozen or more. They are of the same color as 'Coca-Cola,' all that I ever saw. They are similar in taste to 'Cola-Cola.' They all have pretty much the same general taste. We color our drink with caramel. (Rec., 1092). * * * I have never seen a cola beverage not the same general color, I have never tasted one not the same general taste, as 'Coca-Cola.' My beverage is similar to it. Those bottles, the color and taste of the drink, are common to the trade." (Rec., 1093).

LEE HAGAN, president of The Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1291-2):

"The color of 'Ko-Nut' syrup is similar to 'Coca-Cola' and the other cola beverages on the market. I have made a similar product, of that character, before I began making this 'Ko-Nut' and 'Afri-Cola,' called 'Dixie.' (Rec., 1291). * * * I can not say how many caffeine preparations there are on the market

at the present time, except I know there are a good many of them. There is several right around this locality, such as 'Chero-Cola,' 'Gay-Ola,' 'Rye-Ola,' 'Tru-Cola,' 'My-Coca,' 'Joy-Ola,' 'Glee-Ola' * * * 'Mo-Ola,' * * * 'Ala-Cola,' 'Uncle Sam.' I have known of cola drinks—these caffeine drinks,—not counting 'Coca-Cola,'—for about sixteen years. I got into the 'Afri-Cola' sixteen years ago. I knew of that, of course, at that time, and there were one or two other syrups on the market of the nature of 'Coca-Cola,'—'Wine of Coca' was one of them, and I have forgotten what the others were; there were several at that time. 'Wine of Coca' was originally a medicine, but they afterwards made it into syrup form and put it on the market as a soda fountain drink. * * * I have never seen a cola drink that was not of the same general color as our product and 'Coca-Cola' are to-day. They are all colored with caramel coloring. * * * I color our product with caramel coloring." (Rec., 1092).

(b).—Bottlers.

HENRY BOERGER, president of the Chattanooga Bottling Workers, Chattanooga, who has been bottling soda water for 26 years (Rec., 967, 969-70) Chattanooga, Tenn.:

"During that time I have bottled a good many different flavors,—lemon, strawberry, ginger ale, and all the different kinds of soft drinks. I have bottled a number of cola drinks,—'Wine of Coca,' 'Gay-Ola,' and Diehl's 'Star-Cola.' I bottled 'Wine of Coca' about eleven years ago. The color of 'Wine of Coca' is a dark brown. It was the same color as 'Star-Cola,' and the same as 'Coca-Cola.' 'Gay-Ola'

is the same color. The taste of these cola drinks mentioned are all very near the same, similar in taste. (Rec., 967). * * * I have known other drinks on the market similar in color, taste, and appearance to 'Coca-Cola' for about ten or eleven years. (Rec., 968) * * * The color of the syrup of 'Gay-Ola' is similar to 'Coca-Cola' syrup. The color of 'Star-Cola' syrup is the same color as 'Coca-Cola' syrup. The 'Wine of Coca' syrup is the same color as 'Coca-Cola' syrup. I have never seen any syrup for a cola beverage that was not that same color. I have never seen a cola beverage on the market that was not substantially the same color as 'Coca-Cola.' * * * There are hundreds of cola beverages on the market. Besides those I have mentioned are 'Afri-Cola' and 'Ala-Cola.' 'Afri-Cola' has been on the market ten or eleven years." (Rec., 969-70).

R. F. ZIMMERMAN, proprietor of the Union Bottling Co., Chattanooga, Tenn., which bottles "'True-Cola'" (Rec., 978-81):

"I have bottled cola drinks. (Rec., 978) * * * When I first went in business I bottled a cola drink that I made myself, practically five years ago. * * * It compared with the color of 'Coca-Cola' in that it was colored with burnt sugar,—practically the same color. I could not distinguish one from the other, and the tastes were very much alike—the ingredients were almost the same as the original 'Coca-Cola' of to-day. (Rec., 979) * * * I have been bottling the drink in Exhibit No. 2, ['Tru-Cola'] nearly four years, also sarsaparilla and root beer. * * * I have known the drinks sarsaparilla and root beer since '91—twenty-five years ago, or more. The color of root beer and sarsaparilla that I knew at

that time, compared with the color of this drink to-day, is practically the same. They are all colored with burnt sugar coloring. The color of root beer is practically the same as that of 'Coca-Cola' or any cola beverage. * * * I have known those other cola drinks ever since I have been in business,—since '91. When you come in contact with these cola drinks—so many—you cannot keep tract of them. Drinks similar in taste, color, and appearance to 'Coca-Cola' that I know of on the market to-day are 'Lemon-Cola,' 'this 'Rye-Ola,' 'Roxie-Cola,' 'My-Ola,' 'Misti-Cola,' 'Gay-Óla,' and 'Ameri-Cola,' of Americus, Georgia, and this other, 'Mar-Cola,' that is made in some place. I would have to sit down all day and think of them. It would be enough to mention all day long and think of them. There is another one in town, 'L'Aroma,'—that is a dope drink * * * I have known of cola drinks ever since I have been in Chattanooga, and long before that when I traveled for the brewery, I saw cola drinks all over the country, scattered around, but I paid very little attention to them, then, because I was selling beer. * * * I have never known a cola drink on the market that was not substantially the same color as 'Coca-Cola.' They are all practically the same taste." (Rec., 981).

W. M. POLLOCK, proprietor of the Nashville Bottling Works, Nashville, Tenn., which bottles "Fletcher's Cola" (Rec., 1199-1201):

"I have been connected with other bottlings works. I have bottled other cola drinks. We have bottled 'Coca-Nola,' 'Rye-Ola,' 'Gay-Ola,' 'My-Ola,' 'Star-Cola,' and bottled other drinks. * * * I have heard of, I guess, about forty or fifty,—something like that,—different cola drinks. I have known of other cola

drinks ever since I have known anything about working at the bottling plants—that has been about eight years. (Rec., 1199) * * * The color of these different cola beverages are about the same." (Rec., 1201).

C. N. BAKER, a soda water bottler, Newman, Ga., (Rec., 406-7) :

"I could not name all the different colas I have bottled. I have bottled the drink I got from Mr. Mayfield, called 'Koke,' (Rec., 1406) * * * Since then I have bottled 'Cola-Creme,' * * * 'My-Coca,' * * * 'Coca-Nola,' 'Rye-Ola,' and I do not know how many. * * * There is not but very little difference in all these cola drinks in taste and color, if any." (Rec., 1407).

(c).—Dealers In Bottled Goods.

A. F. ENSINGER, bar tender at the Eagle's Club, Chattanooga (Rec., 984) :

"Some of the cola drinks I have dispensed are 'Coca-Cola,' 'Koke,' 'Ala-Cola,' 'True-Cola,' 'Oze-Ola,' and 'Maud Muller,'—I do not know whether I can recall any others are not; there has been six or eight more, I guess, that, during that time, would come and go. I have known of other cola drinks on the market for fourteen years, possibly. As compared with the color of 'Coca-Cola,' they all look about the same. As compared with the taste of 'Coca-Cola,' I could not tell any difference."

JOE QUINN, a bar tender, Chattanooga (Rec., 990-1, 2, 4) :

"I handle 'Koke,' white soda, 'Poinsetta,' and 'Sinalco,' and this 'Pan-pepsin,' we handle that, too, —* * * 'Ala-Cola,' we handled that. Other cola drinks I have handled besides that are 'Star-Cola,' 'My-Coca,' and the stuff made by Mayfield, and had some made by Gerst—I forget the name of it. I have known of 'True-Cola' and other cola products on the market similar to 'Coca-Cola' for ten or twelve years. There is no difference in the color of them, compared with the color of 'Coca-Cola.' * * * I do not see any difference [in taste] to amount to anything,—the same general taste. (Rec., 991) * * * I have never seen a cola drink that was not substantially similar in color to 'Coca-Cola.' * * * The color is all the same." (Rec., 994).

F. E. HOOPER, a retail grocer, Chattanooga, Tenn., (Rec., 997) :

"I have handled cola drinks. I have handled 'Coca-Cola,' I have handled 'Koke'—I handle 'Koke' now,—'Digestol,' and most all,—I buy from all the wagons that go around town. * * * These cola drinks are pretty much the same color as 'Coca-Cola'—all in dark bottles, and look alike."

M. J. COSTELLO, a bar tender, Chattanooga, Tenn., (Rec., 1000, 1002) :

"I have been handling soft drinks for ten years,—bottled goods—soft drinks. I have handled white soda, 'Digestol,' 'Sinalco,' 'Ginger-Ale,' 'Ala-Cola,' 'Tru-Cola,' 'Koke,' 'Rye-Ola,' the coca-cola drinks—'Ala-Cola,' 'Tru-Cola' and 'Coca-Cola'—seem to me to all have about the same color. (Rec., 1000) * * *

I have never seen a cola drink not the same general color as 'Coca-Cola.' (Rec., 1002).

A. W. STANLEY, proprietor Stag Hotel and Bar, Chattanooga, (Rec., 1004) :

"I have handled 'Tru-Cola' and 'Ala-Cola.' They are all about the same color as 'Coca-Cola.' * * * I have never seen a cola drink that was not substanti-ally the same color as 'Coca-Cola.' "

R. W. WAYMAN, a bar tender, Chattanooga, (Rec., 1014-16) :

"I handle soft drinks in connection with my business, some of them being 'Tru-Cola,' white soda, red soda, 'Maud Muller,' 'Poinsetta,' 'Sinalco,' 'Koke,' 'Dope,'—they call it 'Dope.' Other cola drinks I have known of are 'Ala-Cola.' I have known of these other cola drinks since I have been in business,—since they came out. * * * The color of these different cola drinks as compared to the color of 'Coca-Cola,' is about the same, I think. * * * They have the same general taste, along the same general lines. (Rec., 1014) * * * Cola drinks are the same general color as 'Coca-Cola.' (Rec., 1015).

W. F. STRICKLAND, a bar tender, Chattanooga, (Rec., 1048) :

"We handle 'Koke,' 'Maude Muller'—that is a dope—and we used to handle Zimmerman's stuff,—'Dope,' I believe it was,—and also handled 'Coca-Cola.' The color of these different cola drinks, so far as I can see, is about the same."

LUKE POGUE, bar tender, Patten Hotel, Chattanooga, (Rec., 1060):

"I have dispensed a general line of soda water,—red, and white, and ginger ale, 'Digestol,' 'Coca-Cola,' 'Rye-Ola,' 'Gay-Ola,' 'Ala-Cola,' 'Nerve-Ola,' 'Koke,' and 'Gay-Nol.' Most all coke drinks have the same color. * * * I have known of these other drinks on the market similar to 'Coca-Cola' about **ten years.**"

J. C. McDONALD, a bar-tender, Chattanooga, (Rec., 1067-8):

"I have 'Coca-Cola,' 'Cinalco,' 'Poinsetta.' (1067)
* * * I have got 'Koke' since I have been in business here. When in business with other people we had 'Coca-Cola' for sale, we had 'Ala-Cola,' 'Maude Muller,' and 'Tru-Cola.' The color of those drinks, as compared with 'Coca-Cola,' are practically the same thing. I could not see any difference in them; no one could see any difference at all. I could not see any difference in the taste compared to 'Coca-Cola.' * * * I would not know a glass of 'Coca-Cola,' by its taste, from the other cola drinks I have handled. * * * I have never seen a cola drink not practically the same color as 'Coca-Cola,' and practically the same taste."

J. M. WHEELER, a bar tender, Chattanooga, (Rec., 970, 972):

"I have handled 'Coca-Cola,' 'Maud Muller,' 'Koke,' 'Rye-Ola,' and 'Star-Cola.' I do not know as I can tell any difference in the color of these beverages, compared to the color of 'Coca-Cola,' as they

all appear to be the same thing. * * * There is very little difference in the taste of these cola beverages, as compared with the taste of 'Coca-Cola.' (Rec., 970) * * * The color of 'Koke' is the same as the color of other cola beverages. I do not see any difference in the taste. * * * I have known of these cola beverages similar to 'Coca-Cola' in color, taste, and appearance, four or five years." (Rec., 972).

TOM COLLINS, steward at the Eagle's Club, Chattanooga, (Rec., 988-90):

"Some soft drinks we have are white soda water, 'Koke,' 'Coca-Cola,' 'Poinsetta.' * * * I know of 'Ala-Cola' and this 'Maude Muller,' but we do not handle them any more. The color of these cola drinks is the same as 'Coca-Cola.' * * * I could not tell any difference much in the taste, either. * * * I have known the products root-beer and sarsaparilla ever since I have been here in Chattanooga, about twenty-eight years. The color of root beer and sarsaparilla is about the same as 'Coca-Cola.' (Rec., 988). * * * I have known of other drinks on the market similar in color, taste, and appearance to Coca-Cola,' I suppose, for ten years. Some of the drinks of that kind are 'Star-Cola'—that tastes like it—I could hardly tell the difference. This 'Maude Miller' tastes a good deal like it." (Rec., 989-990).

E. W. FREEMAN, a bar tender, Chattanooga, (Rec., 973, 5, 6):

"I have handled cola drinks. Some of the drinks are 'Coca-Cola,' 'Rye-Ole,' 'Maude Muller.' (Rec., 973) * * * I am a bar tender and have known of

the cola drinks other than 'Coca-Cola' possibly eight years, and perhaps longer. I have been handling

other cola drinks since I have been in the saloon business the greater portion of that time. * * * I have never seen a cola beverage that was not the same general color as 'Coca-Cola.' They generally taste about alike to me." (Rec., 975-976).

R. W. LOCHRIE, a bar tender at the Woodard Bar, Birmingham, (Rec., 1039-40):

"I have dispensed soft drinks there, and cola drinks, also. We are handling just at present 'Nifti-Cola.' Before we began handling 'Nifti-Cola,' we handled 'Cola-Nip' and 'Coca-Cola.' (Rec., 1339) * * * These different cola drinks are practically all the same color." (Rec., 1340).

(d).—Dealers In, and Dispensers of, the Soda Fountain Product.

W. M. SIDEBOTTOM, (Rec., 1162-3):

"There are a great many cola drinks on the market—'Celery-Cola,' 'Star-Cola,' 'Cola-Ade.' I have known of cola drinks on the market to my best recollection twenty-five or twenty-eight years, I guess. I have never seen a cola drink that was not the same general color. All cola drinks are very similar in taste. At the establishment where I am now located we dispense *Atlanta* 'Coca-Cola'; we dispense no others besides that."

J. G. BOOTH, soda dispenser at Paul and John Stumbs,' Nashville, (Rec., 1169-70):

"We are dispensing 'Coca-Cola' straight at the place where I am now working. I have known of cola drinks ever since I have known the original 'Coca-Cola.' (Rec., 1169) * * * 'They look alike.' (Rec., 1170).

J. C. PRICE, now proprietor of a restaurant, but formerly a soda dispenser, Nashville, (Rec., 1205-6):

"There are many different brands of cola drinks I have served. I could not call them all. I know a few—'Arrow-Cola,' 'J. D. F. Cola,' 'Koke' and 'Cola,' 'Gay-Ola,' 'Afri-Cola,' and I have dispensed 'Star-Cola,' and 'Gerst's Cola,' too, and 'Coca-Cola.' I have worked in Nashville, St. Louis, Evansville, and Birmingham. At these different towns I have sold different cola drinks. (Rec., 1205) * * * 'The taste and color of these different cola drinks is almost the same.' (Rec., 1206).

BRANCH DARDEN, soda dispenser at Henry Skagg's soda fountain in the Stahlman Building, Nashville, (Rec., 1123-4):

"The cola drinks I dispense are 'Fletcher's Cola,' 'Dope,' 'Coca-Cola,' and others I cannot remember. I have known of these other cola drinks, ther than 'Coca-Cola,' most ever since I have been in the business. (Rec., 1123) * * * Other cola drinks I have known of [are] 'Ala-Cola,' 'Star-Cola,' 'Fletcher's Cola.' 'They are almost the same color,—look to me like about the same color, * * * pretty much the

same taste. 'They are almost the same color, they seem to me. * * * Just to a casual glance they look about alike.' (Rec., 1124).

P. D. JOHNSON, soda dispenser at the Warner Drug Co., Nashville:

"We dispense 'Coca-Cola' and a black syrup called 'Dope.' They used 'Fletcher's Cola' and have used 'Diehl's Star Cola.' (Rec., 1151). * * * The general color of these cola drinks is about the same. At the baseball park here in the summer time they serve Pepsin and Diehl's 'Star Cola.' * * * Diehl's 'Star-Cola' is all that is advertised out there. * * * It is about the same color, taking the concentrated syrup and comparing the two. The beverage that is made from the syrup is about the same as 'Coca-Cola.' " (Rec., 1152).

W. W. RANDOLPH, soda dispenser at the Hoodenpile Drug Co., Nashville (Rec., 1160-1):

"Some of the cola drinks that we have dispensed are 'Star-Cola,' 'My-Cola,' 'Pepsi-Cola,' and I guess about a dozen others. * * * I have heard of about a dozen cola drinks on the market several years back, —as well as I can remember eight years, any way. (Rec., 1160). * * * The color and taste of these different cola drinks are all about the same." (Rec., 1161).

F. H. WILLIS, soda dispenser at "Ha Ha Store, Nashville (Rec., 1191):

"We are dispensing a general line of soda drinks.

Besides 'Coca-Cola,' we have 'Candy-Cola.' The color of 'Candy-Cola' is very similar to 'Coca-Cola.'"

MATT WILSON, proprietor of a retail drug store, Nashville (Rec., 1209):

"I dispense 'Gerst's Cola.' It looks like 'Coca-Cola,' and I never did see any difference in the taste."

F. C. DORIDER, for 24 years in soft drink and confectionery business, Nashville (Rec., 1195-6):

"We handled different kinds of cola,—'Cola-Ade,' 'Celery-Cola,' 'Coca-Cola,' and a good many of those colas, I cannot recall them. * * * Cola drinks besides those I have mentioned are 'Star-Cola,' 'Cola-Ade,' and maybe some others. (Rec., 1195.) * * * They were very much alike in color." (Rec., 1196).

WILLIAM F. DAVIS, an attorney-at-law, and a stockholder in the Davis Funston Drug Co., which has a chain of drug stores in Nashville (Rec., 1102):

"We dispense cola drinks. Some [of the] drinks are 'Coca-Cola,' 'Afri-Cola,' 'Fletcher's Cola,' 'Ala-Cola,' 'Arrow-Cola,' I believe it is,—'Star-Cola,' 'Gerst's Cola,'—not all of those at every place,—at different places, at different times, we have used those cola drinks. I knew of other cola drinks besides 'Coca-Cola' before 1909. * * * Cola drinks on the market today—there are hundreds coming in everywhere; some have been on the market for several

years, I could not tell you how many. The color of these different cola drinks, compared with the color of 'Coca-Cola,' is not much different. The taste in many cases is almost indistinguishable."

C. P. EMBREY, proprietor of Embrey Drug Store, Chattanooga (Rec., 1019-20):

"I dispense soft drinks at my soda fountain. I dispense cola drinks there. I dispense 'Coca-Cola' and one named 'Ko-Nut.' * * * I have heard of 'Tru-Cola.' There are a great many cola drinks on the market. The color of the syrup of these different cola drinks is identical with the color of the 'Coca-Cola' syrup. * * * I have known of the drink root been fifteen or twenty years, I reckon. * * * The root beer I have known for the past fifteen or twenty years has been substantially the same color as it is today. (Rec., 1019). * * * We do not handle Hires' root beer, we have not for years. I could not tell any different between the root beer we handle and Hires'. The color is about the same." (Rec., 1020).

F. M. BOGART, prescription clerk and soda dispenser, Chattanooga (Rec., 1070):

"We serve 'Coca-Cola,' 'Ko-Nut,' 'Afri-Cola' and 'Mays-Ola.' * * * They are very much the same in taste as 'Coca-Cola.'"

C. H. JOUETT, a retail druggist, associated with the Live & Let Live Drug Co., Chattanooga, and formerly connected with the Miller Pharmacy at Chattanooga (Rec., 1051):

"We handle 'Coca-Cola,' 'Ko-Nut' and 'Ala-Cola,' I think; I do not remember whether we handle any other cola drinks or not. I have known of drinks similar in color, taste and appearance to 'Coca-Cola' I presume for ten or twelve years, probably longer, —fifteen years, probably. They are alike in color and taste as far as I am able to state." * * *

DR. H. O. NULL, a practicing physician and proprietor of a retail drug store, Chattanooga (Rec., 1063):

"We have cola drinks. The only cola drinks we have now are 'Coca-Cola' and 'Ko-Nut.' I have handled a number in my time. I have handled 'Wise-Ola,' 'Luck-Ola,' and 'My-Ola.' I have handled 'Coca-Cola' during the time I have had the soda fountain. We have always handled some cola drink. * * * In a general way they are all similar to each other. The taste of these cola drinks, compared with the taste of 'Coca-Cola,' is very similar."

BURTAN JONES, a retail druggist, Chattanooga (Rec., 1106):

"I dispense cola drinks,—'Coca-Cola' and 'Tru-Cola.' The color of 'Tru-Cola' syrup is a brown liquid about the same as 'Coca-Cola.' I could not distinguish the difference in color between 'Tru-Cola' syrup and 'Coca-Cola' syrup. I could not distinguish the difference in color between the completed drinks as served at the fountain, and 'Coca-Cola.' I could not distinguish the difference in taste between 'Tru-Cola' and 'Coca-Cola.'"

T. H. LEVER, proprietor of the K. W. N. Pharmacy, Spartanburg, S. C. (Rec., 1228, 1245-6):

"I have handled the 'Dope' and 'Koke' and 'Coca-Cola.' I know a number of others,—'My-Coca,' 'Ko-Nut,' 'Rye-Ola,' 'Gibb's Cola.' * * * I have kiown of cola drinks ever since I have been in the drug business,—about eight years. These cola drinks are almost the same color, * * * and just about the same in taste. (Rec., 1228). * * * At the Union Drug Co. I handled a product,—I cannot recall the name,—Mr. Sizemore is the gentleman that sold it at that time. It was a heavy cola syrup; the taste and color of it was about the same as 'Coca-Cola.' I handled it before I handled 'Koke' and 'Dope.'" (Rec., 1245-1246).

E. A. SHARP, proprietor of the Terminal Pharmacy, Jacksonville, Fla. (Rec., 1250, 4, 6):

"We dispense ice-cream sodas, root beer, Coca-Cola, Koke, Dope, Brain-Ol, Gay-Ola—you know about the line of stuff we handle,—all those. We do not dispense Gay-Ola right at the present time. (Rec., 1250). * * * Every man in my town has always handled three or four different kinds of cola drinks. (Rec., 1254). * * * All these drinks are similar in color and taste to 'Coca-Cola.'" (Rec., 1256).

ROBERT E. OUSLEY, a retail druggist, Kosciusko, Miss. (Rec., 1447):

"This drink 'Ko-Nut' is rather similar to 'Coca-Cola.' You could not hardly tell the difference between them by looking at or tasting them."

C. J. THORNTON, proprietor of the Corner Drug Store, Hattiesburg, Miss. (Rec., 1759-60, 1762):

"I have dispensed at my soda fountain a general line of all flavors, and I have sold 'Afri-Cola,' 'Coca-Cola,' 'Dope,' 'Ko-Nut,' 'Ala-Cola.' * * * The color of these cola drinks is something like the color of root beer,—colored with caramel coloring, I have been always told. The color of the various cola drinks compare very similar with each other. They all taste alike to me. I never saw a cola drink that was not of the same general color and taste. (Rec., 1759, 1760). * * * Sarsaparilla and root beer are the same color, and lots of things are the same color—creme soda is the same color." (Rec., 1762).

(e).—Members of the general public.

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1072-4):

"I know J. C. Mayfield. Have known him, I can say, for twelve or fourteen years. * * * Then he was manufacturing 'Celery-Cola.' * * * It resembled all these cola drinks. As compared to 'Coca-Cola,' you could not tell the difference, (Rec., 1072). * * * The 'Coca-Cola' and 'Celery-Cola' are like those cola drinks. I could not tell any difference from the other cola drinks. (Rec., 1073). * * * We printed labels for hundreds of people for different cola drinks,—'Haskell's Cola,' at Cookeville, North Carolina, and we printed 'Koke' labels for Kelley & Westmore, at Franklin, Ky., and we have printed 'Texa-Cola,' 'Call's-Cola' for some firm in North Carolina, Fletcher's Cola, a Nashville concern, Diehl's 'Star-Cola,' for Diehl & Lord, of Nashville,

'Gerst's Cola,' for Gerst's Bottling Works, of Nashville, and we have printed Heck's 'Star-Cola' for Heck, of Nashville,—there were so many of them—I can get you a list of them from the office. I have known of cola drinks on the market other than 'Coca-Cola' practically ever since I can remember, ever since I have been in Nashville, any way,—that would be eighteen years the first of January. The color of all these cola drinks I have seen, as compared with 'Coca-Cola,' are all practically the same color and taste as compared with the taste of 'Coca-Cola.' I have never seen a cola beverage not the same general color. I have never tasted a cola beverage that did not have the same general taste." (Rec., 1074). * * *

E. D. MONTGOMERY, manager of the Eastern Division, Southern Bell Telephone Co., Birmingham, (Rec., 1362-3):

"I do not know how many there is, really there is a number of drinks of that class. Those drinks look alike and taste alike. (Rec., 1362). * * * There are four or five of those drinks you could set out and I could not tell you the difference to save my life, just which is which." (Rec., 1363).

3

Admissions of Plaintiff's Witnesses.

DR. CHARLES E. CASPARI, St. Louis, Mo. (Rec., 901-2):

"I have had experience, also, examining products

that are similar in appearance to 'Coca-Cola,' and have analyzed *three hundred* samples of such products."

DR. H. B. FULLER, plaintiff's chief chemist, Washington, D. C. (Rec., 2266) :

"I have made in the neighborhood of 1500 analytical examinations of other kinds of beverages of the kind and character of 'Coca-Cola.'"

R. W. BROWN, soda water business, New Orleans, La. :

"There is a bunch of drinks on the market similar to 'Coca-Cola.' I do not recollect the names of all of them, but there are quite a number of them, I think there is one called 'Cola-Ade.' " (Rec., 682).

EDWARD T. LAGAN, owner of a lunch room, formerly a drug clerk, Chicago :

"Yes, sir, I have dispensed some of the other cola drinks. I have dispensed 'Lime Juice and Cola,' and 'Cola-Mint,' * * * That has been one the market right along for the last ten years. Yes, sir, it has the same color as 'Coca-Cola.' I have handled it and know that it has been on the market for the last ten years. It is made by Parke-Davis & Company, of Detroit. (Rec., 896). * * * I have handled at the fountains and places where I have dispensed drinks both root beer and sarsaparilla. * * * They are the same general color as 'Coca-Cola,' and it would be hard to distinguish between them and 'Coca-Cola.' * * * They are all dark. There are so many other drinks which I have dispensed at my

fountain of that dark color that I really could not begin to tell you how many of them I have dispensed. Almost all of the drinks are dark, * * * that is the general color for drinks at soda fountains,—just about—dark and red and brown.” (Rec., 896-897).

F. C. PEACE, an ex-Pinkerton detective, employed by plaintiff as a detective in this case (Rec., 2105-6, 2217):

“No, sir, I cannot tell the difference between ‘Coca-Cola’ and other drinks on the market. I know of probably ten other drinks on the market that are similar to ‘Coca-Cola.’ * * * I have seen ‘Ko-Nut,’ ‘Rye-Ola,’ ‘Wise-Ola,’ ‘Ala-Cola,’ ‘Lemon-Cola,’ ‘Chero-Cola,’ ‘Celery-Cola,’ ‘My-Cola,’ ‘Moxie,’ and sarsaparilla, and this dark colored creme soda. * * * These drinks are all similar in color to ‘Coca-Cola.’ I have also heard of ‘Star-Cola,’ ‘Luck-Ola,’ ‘Glee-Nol,’ and ‘Tru-Cola,’ but I have never seen those drinks. (Rec., 2105-6). No, sir, I could not tell the difference in taste between ‘Coca-Cola’ and these other cola drinks on the market. * * * The stuff that the Southern Koke Co. make at New Orleans that they call ‘Dope’ and ‘Koke,’ I could not tell the difference between that and ‘Coca-Cola.’ * * * ‘Ko-Nut’ is another one that is hard. * * * ‘My-Coca’ tastes very much like ‘Coca-Cola,’ I cannot tell the difference. * * * ‘Rye-Ola’ and ‘Wise-Ola,’ I think, are very much like ‘Coca-Cola.’ * * * So many of these various cola drinks taste so much like ‘Coca-Cola’ that I cannot tell the difference.” (Rec., 2217).

H. B. PIERCE, chief detective of the Coca-Cola Co. (Rec., 2132):

"I do not know, and have no idea, how many cola drinks there are on the market. I know possibly fifteen or twenty. * * * All of these cola drinks I have known of all have about the same color, and are put up in the same kind of bottle, and have pretty much the same general taste." (Rec., 2132).

C. C. ROSS, one of plaintiff's numerous spotters (Rec., 2174, 2176):

"Yes, sir, I have seen bottles containing other cola drinks. * * * I have seen a great many cola drinks,—I have seen several of them, for instance, 'Chero-Cola,' 'My-Coca,' 'Parafait,' 'Chas.-Cola,' 'Epps-Cola,' 'Rivo-Cola.' I could study up some more, but that is all I can think of right now. (Rec., 2174). * * * If they put sarsaparilla in 'Coca-Cola' bottles I do not expect I could tell it by looking at it. Yes, sir, I have seen other drinks similar in color to 'Coca-Cola' in bottles,—'My-Coca' and the others I named awhile ago. I cannot say I have seen any other drinks, other than cola drinks, which are similar in color to Coca-Cola." (Rec., 2176).

NORVELL N. LEAVER, manufacturer of "Orin-Cola," St. Louis, Mo. (Rec., 2036-7):

"I put out a drink known as 'Orin-Cola.' That is a drink similar to 'Coca-Cola.' It looks like 'Coca-Cola.' It is colored the same as 'Coca-Cola.' * * * I colored my drink the color of 'Coca-Cola' for the simple reason that it is customary among the trade. * * * It is the custom, from experience, when people ask for lemon soda you have to have a white soda, and, if they ask for sarsaparilla, it is black; if they ask for 'Dr. Pepper,' it is black; and we

color them for that simple reason, I suppose. I give it the flavor it has because people like flavor of that kind."

JOHN H. BOHNE, an employee of the Liquid Carbonic Company, St. Louis, Missouri, formerly in partnership with Norvell N. Leaver in the manufacture of "Orin-Cola" (Rec., 2045):

"After I left Mayfield, I went in partnership with him [Norvell N. Leaver] in 1904, in the manufacture and sale of a drink called 'Orin-Cola.' * * * The color of 'Orin-Cola' was a dark color, like the other cola drinks. Most all of the cola drinks I ever saw are about the same color. I never saw any difference in them, so far as the color is concerned. Burnt sugar produces that color. * * * My understanding of the thing is that any drinks that would be called under the name of cola usually have the same color." (Rec., 2045).

T. J. HAZLIP, a retail druggist, Fort Worth, Texas (Rec., 1962-3):

"I have never tried to dispense any of the other beverages, but I have drank it at the other soda fountains. (Rec., 1962). * * * The other products are very similar to Coca-Cola, if I understand it. In other words, personally, I cannot tell the difference between them." (Rec., 1963).

D. E. MOODY, Birmingham, Alabama:

"You ask how many cola drinks there were on the market in Birmingham at the time I was in the bot-

ting business with the Celery-Cola Company [1903-1904]; why, at that time Mr. Peck was manufacturing a drink over here which he called 'Rye-Ola,' and there was a 'Wise-Ola' bottling plant. * * * Yes, sir, I remember about 'Ala-Cola,' also, and there was one at Bessemer. (Rec., 1887). * * * I have been making a drink called 'Queen-Ola,' up to last fall. * * * I have been making it some three or four years. * * * Yes, sir, that is a syrup for making a soda fountain beverage. * * * I colored it artificially with caramel. (Rec., 1888). * * * You ask if I think a casual purchaser could tell the difference between my product and 'Coca-Cola' by the color; well, mine is a good deal darker, almost as dark as root beer. [The witness was asked if he could tell the difference between his product, 'Queen-Ola,' poured into a glass, and a glass of, say, 'Rye-Ola,' but he did not answer the question]. You ask why I color my drink with caramel; most all these drinks are colored that way. (Rec., 1946). * * * You ask why I colored it that color instead of pink, green, or some other color; it is just customary for it to be colored that way. * * * You ask if I have ever seen a drink of that sort that was not that same color; there are some darker than others, but they are all about the same general color, oh, yes. * * * You ask if I ever saw a cola drink that was, say, the color of ginger-ale; I do not know that I ever did." (Rec., 1947).

J. M. PENLAND, a wholesale druggist, Waco, Texas:

"Yes, I am acquainted with the fact that there are various drinks on the market similar to 'Coca-Cola,' I know that there is. (Rec., 1980). * * * The drink

known as 'Dr. Pepper' is still being sold in Waco. I do not know how long it has been on the market, but I have known of it fifteen or eighteen years." (Rec., 1983).

DAVE S. BAUER, retail druggist, Mobile, Alabama :

"Yes, sir, I have heard people ask for cola beverages, besides 'Coca-Cola.' I have heard them ask for 'Gay-Ola,' and for 'Carre-Cola,'—that last is manufactured in Mobile by D. Carre Company, I do not think of any other. 'Carre-Cola' is the same color as 'Coca-Cola.' * * * I do not know whether or not there are as many as 150 cola beverages on the market, but I say I know of some of the 150, meaning thereby a large number. I have no idea how many I know of. All of those that have come under my observation are of the same color as 'Coca-Cola.' I could not tell you whether or not they all taste similar to Coca-Cola, because I have never tasted any except the 'Carre-Cola.' (Rec., 541-542). * * * I understand you to mean by cola drink, a drink that is similar in color, taste, and appearance to 'Coca-Cola.' Any recognized cola drinks, or any that have been advertised, are the only ones I have heard the public call for. I know there are quite a number of them, among which are 'Afri-Cola' and 'Gay-Ola.' * * * I have also heard the public ask for 'Lime-Cola.' That is a soda fountain drink put up by Park-Davis & Co., of Detroit. (Rec., 542). * * * I do not believe I could tell you the difference between it and 'Coca-Cola' in color." (Rec., 543).

G. H. UPCHURCH, president and manager of the Bienville Pharmacy, Mobile, Ala. :

"The color of these other cola drinks which I saw was similar to 'Coca-Cola'—they are similar in color to 'Coca-Cola.' It is pretty hard for me to recall right at the present time the different cola beverages I have seen which are similar in color to 'Coca-Cola.' I have seen samples of 'Afri-Cola,' and of 'Dope' and 'Koke,' and I have seen samples of others which I cannot recall at the present time—one was made in Birmingham, I think, that I have seen samples of, but I do not remember the name of it. I do not know whether it was 'Rye-Ola' or not,—I think that was the name. I have seen samples of 'Wise-Ola.' That is made at another place, I do not know whether that is made at Birmingham, or not, but I have seen samples of it." (Rec., 526).

T. M. MURPHY, a detective in the employ of the Coca-Cola Company:

"Well, I have no first hand knowledge as to how many concerns there are making drinks similar to 'Coca-Cola,' but what knowledge I have was gotten at a picture show at Camden, Ark. I saw an advertisement stating there were 156" (Rec., 509).

F. M. GREEN, a retail druggist, Atlanta, Georgia:

"I do not know how long I have been handling

'Hires' root beer, but it has been ten or twelve years, though, any way. Yes, sir, we handled root beer before that—the one that we made ourselves. * * * The color of the sarsaparilla we handled was a brown color. (Rec., 452). * * * I have seen 'Moxie,' and that is a deep brown color. * * * Root beer and sarsaparilla are colored with caramel. (Rec., 453). * * * I know a number of drinks on the market to-

day of substantially the same color, taste, and appearance as 'Coca-Cola.' (Rec., 454). * * * I do not know how many such drinks there are on the market. 'There might be a dozen, I do not know.' (Rec., 455).

LINTON L. STEPHENS, soda dispenser and cigar clerk, Atlanta, Ga.:

"I have seen several drinks on the market similar to 'Coca-Cola'—'Ko-Nut,' 'Afri-Cola,' 'Cola-Ade.' 'Ko-Nut' looks like something similar to 'Coca-Cola' and root beer. I do not know that I have ever tasted it." (Rec., 486).

J. W. HUGGINS, a Coca-Cola bottler, Murfreesboro, Tennessee, who formerly bottled a product which he labeled Koke:

"The first product we bottled and labeled 'Koke' was, I think, 'Nerve-Ola,' but we have bottled several different things that we branded 'Koke'—several of these different cola drinks. What we got from the 'Nerve-Ola' people was the completed syrup. It looked like 'Coca-Cola,' and tasted pretty much like 'Coca-Cola.'" (Rec., 2012-2013).

GEORGE J. MARTIN, traveling salesman for the Coca-Cola Company:

"Yes, in my experience as a traveling man visiting drug stores and soda fountains over the country I have observed other beverages dispensed from soda fountains of a similar color to 'Coca-Cola.' 'Koke' and 'Dope,' has a similar color to 'Coca-

Cola.' 'Gay-Ola' has a similar color, and I have seen several on the market that had a similar color. (Rec., 342). * * * I have seen a product on the market known as 'Afri-Cola,' that has a similar color to 'Coca-Cola.' (Rec., 343).

ASA G. CANDLER:

"Oh, yes, there is a drink called 'Afri-Cola.' I have heard of it frequently. Yes, sir, I think I have seen it—I know I have. It is about as near the color of 'Coca-Cola' as they could get it. (Rec., 383). * * * Yes, sir, there is a 'Ko-Nut'—that is run by the same gang, I think. * * * I understand that Hagan & Dodd make 'Afri-Cola' and 'Ko-Nut.' I do not know, but I think that have been making it ten or twelve years." (Rec., 384).

CHARLES HOWARD CANDLER:

"Yes, sir, I know the firm of Hagan & Dodd. * * * Yes, sir, they have made a drink called 'Ko-Nut.' * * * I have not seen much of the 'Ko-Nut' for three or four years, I do not think. * * * No, I do not know how many soft drinks there are on the market today that are about the same color as 'Coca-Cola'—that same general line of color—caffeine or cola drinks. I never thought of it." (Rec., 398).

DAVID G. WISE, a retail druggist, Atlanta, Ga.:

"Yes, sir, I have seen 'Afri-Cola.' Why, I do not know how long I have known it,—five or six years, I think. It was brought to me and offered for sale. It looked like 'Coca-Cola.' * * * I tasted, of course,

to a certain extent like 'Coca-Cola.' * * * 'There is a similarity. (Rec., 475-476).

CHARLES KINGSBERRY, in the cigar and soda water business, Atlanta, Georgia:

"You ask if I know any other soda fountain drinks of the same color as 'Coca-Cola;' why, 'Coca-Cola' looks something like the color of root beer, I suppose, and sarsaparilla. * * * Root beer and sarsaparilla are the only other drinks that I have ever seen that have that color. * * * I have seen 'Ko-Nut,'—I used to drink it at the ball park when I could not get 'Coca-Cola,' years ago. 'The color of 'Ko-Nut' is something like the color of 'Coca-Cola.' * * * Yes, sir, it is pretty close to 'Coca-Cola.' " (Rec., 467).

PETE VERGE, soda water and cigar business, Atlanta, Georgia:

"There used to be a Nova-Cola Company that made 'Nova-Cola,' located on Mitchell Street across to my place. They used to be in Rome, Ga., and I think they are there now, if I am not mistaken. The color of it was the 'Coca-Cola' color. * * * It looked like 'Coca-Cola,' of course, the color." (Rec., 490).

W. L. SAMS, traveling salesman of the Coca-Cola Company:

"Yes, sir, I have seen 'Moxie' and it is similar in color to sarsaparilla and root beer." (Rec., 337).

NICK D. CHOTAS, in the cigar and soda water business, Atlanta, Ga.:

"I dispense at my soda fountain, besides 'Coca-Cola,' * * * 'Hires' root beer,' * * * The color of the root beer which I dispense is black—well, very like 'Coca-Cola.' * * * 'Hires' root beer is more like 'Coca-Cola,' more the color of 'Coca-Cola.' Well, I do not know whether or not it would be very hard, or, in fact, impossible, unless yu made a very careful examination of the two colors together, to tell whether a drink was 'Coca-Cola' or 'Hires' root beer,—by the color you can't." (Rec., 448-449).

GEORGE ALFRED HARBOUR, proprietor of Harbour's Smoke House, Atlanta, Georgia:

"Well, yes, I have seen other drinks on the market similar to 'Coca-Cola' in color; you might say 'Hires' root beer is similar to a certain extent in color." (Rec., 458).

I. L. JAMES, a retail druggist, Atlanta, Georgia:

"You ask what other drinks are on the market that are similar to 'Coca-Cola' in color. Well, root beer resembles 'Coca-Cola,'—foams a little more,—and sarsaparilla—of course, sarsaparilla and root beer are similar. * * * Yes, sir, I have made root beer myself. Why, we colored it with burnt sugar,—caramel,—if we colored it at all. * * * Well, I do not know what is the difference in color between a glass of root beer or a glass of sarsaparilla as served at a soda fountain and a glass of 'Coca-Cola.' 'Coca-Cola' might be a shade lighter, I don't know. Yes, sir, it is very hard to tell the difference. No,

I do not think the ordinary customer, coming in, if he saw a glass of one and a glass of the other sitting on the counter, could tell the difference between them." (Rec., 461-462).

JOHN MEHOS, in the cigar, soda fountain, and restaurant business, Atlanta, Georgia:

"You ask if I have handled anything else besides 'Coca-Cola' of that same color since I have been in business in Atlanta; root beer, you know, and sarsaparilla are drinks of that color." (Rec., 512).

T. C. LUPTON, manager of the Coca-Cola Bottling Works, Dallas, Texas:

"We bottled 'Iron Brew' last year. * * * No, sir, it is not a 'Coca-Cola' product. Yes, sir, we did put it up in 'Coca-Cola' bottles. (Rec., 778). * * * Iron Brew is about the color of 'Coca-Cola.'" (Rec., 779).

A. B. FREEMAN, manager of the Coca-Cola bottling plant, New Orleans, La.:

"Q.—I asked you, 'Isn't it true that you, yourself, bottled "Grapine" and sarsaparilla in your "Coca-Cola" bottles?' You answered, "We have not bottled any other things in them for the last two and a half to three years;" that is the correct answer, wasn't it? A.—Yes, sir, and I reiterate that. And that meant that I had bottled other things anterior to the last two and a half to three years, and the qualification as to 'Grapine' that I now make is that we put sarsaparilla in such bottles and not 'Grapine,'

because it was not then on the market. My recollection is that 'Grapine' was first put on the market at the beginning of last year—possibly last fall. That is not a 'Coca-Cola' product. That is put up by the William A. Abbott Co., of Los Angeles. It is about the same color as sarsaparilla and 'Coca-Cola.' * * * It is about the same general appearance and color." (Rec., 644).

4

The Ineviable Conclusion.

HENRY BOERGER (Rec., 968):

"I would not know a glass of 'Coca-Cola' if I saw it by its color, because there are other drinks of the same color besides,—for instance, root beer and these cola drinks, sarsaparilla. * * * I would not know a glass of 'Coca-Cola' by its taste, because there are other drinks that taste similar to it."

R. F. ZIMMERMAN (Rec., 980):

"I could not distinguish a glass of 'Coca-Cola' by its color, because there are plenty of drinks of the same color, so far as that goes. I could not say whether it was 'Coca-Cola' or not, because it was colored that way." (Rec., 980).

M. J. COSTELLO (Rec., 1000):

"I could not distinguish a bottle of 'Coca-Cola' by its color,—by the color of the drink inside of it." (Rec., 1000). * * * If some one set them out for me, I might not know whether it was 'Tru-Cola,' or 'Koke,' or 'Coca-Cola;' I do not think I could tell the difference, myself." (Rec., 1002).

E. W. FREEMAN (Rec., 974-5):

"I do not believe I could distinguish a glass of 'Coca-Cola' from any other drinks, or dopes, whatever they call them, if you set three or four of them out in a glass on a table I do not believe I could

distinguish 'Coca-Cola' from 'Koke,' or 'Maud Muller,' or anything like that. (Rec., 974). * * * I have also handled in my place of business sarsaparilla, and root beer,—Hires root beer and sarsaparilla. I have known of those drinks for years. * * * I do not know whether I could tell a glass of sarsaparilla, or a glass of 'Coca-Cola,' or a glass of 'Koke,' or a glass of 'Ala-Cola,' or anything,—set them out there, I do not know, I do not believe I can pick them out just in a glass, they are colored so much alike. * * * I have handled a number of different kinds of beer. I do not see but very little difference in the color of the different kinds." (Rec., 975).

J. M. WHEELER (Rec., 972):

"I would not know a glass of 'Coca-Cola' by its color, and I could not swear that I could tell it by its taste. Cola beverages are similar in taste, color and appearance."

A. F. ENSINGER (Rec., 984-6):

"I would not know a glass of 'Coca-Cola' by its color. Those are all about the same color. I never could distinguish one from the other by the color of it, and they all taste pretty much alike,—there is so little difference in it I could not distinguish them. (Rec., 984-985). * * * I expect I have handled all the different brands of beer there are in this market. With the exception of dark beers, the light beers, you cannot distinguish one from the other, hardly. It would be an easy proposition to serve a fellow one brand of beer if he asked for another, if you were serving out of the keg." (Rec., 986).

W. F. BOYLIN (Rec., 1076):

"If I saw a glass of 'Coca-Cola' served at a fountain I could not distinguish it from any of the other cola beverages I have seen by its color. I could not distinguish it by its taste." (Rec., 1076).

C. H. JOUETTE (Rec., 1052):

"I could not distinguish a glass of 'Coca-Cola' from the other cola drinks that I have known of. I could not tell the difference in color or taste, and personally, so far as I am concerned, it would not make any difference, so they gave me a cola drink."

A. W. STANLEY (Rec., 1004):

"I could not distinguish a bottle of 'Coca-Cola,' by the color of the drink, from these other drinks."

C. P. EMBREY (Rec., 1019):

"I could not distinguish a glass of 'Coca-Cola' by its color. I could not distinguish a glass of 'Coca-Cola' from a glass of root-beer—both are dark brown."

BURTON JONES, proprietor of a retail drug store, Chattanooga (Rec., 1006):

"I dispense cola drinks—'Coca-Cola' and 'Tru-Cola.' The color of 'Tru-Cola' syrup is a brown liquid, about the same as 'Coca-Cola.' I could not distinguish the difference in color between 'Tru-Cola' syrup and 'Coca-Cola' syrup. I could not dis-

tinguish the difference in color between the finished drinks as served at the fountain and 'Coca-Cola.' I could not distinguish the difference in taste between 'Tru-Cola' and 'Coca-Cola.' "

R. L. WAYMAN (Rec., 1014):

"I do not think I could tell a glass of 'Coca-Cola' from these other drinks by the color of it. * * * Cola drinks taste almost alike,—that is, I could not tell the difference." (Rec., 1016).

JOE QUINN (Rec., 992):

"I could not distinguish a glass of 'Coca-Cola' from a glass of root beer by the color. * * * I could not distinguish a glass of 'Coca-Cola' by its color. I could not tell one from the other, both have the same color, a dark sort of color."

SCHEDULE VI.

The Color of the Barrel.

1

DEFENDANTS, AND THEIR PREDECESSORS, HAVE USED BARRELS OF THE SAME COLOR AS THOSE THEY NOW USE SINCE 1888.

J. C. MAYFIELD, Sr. (Rec., 1641-2) :

"I have painted our barrels red because that is the color Dr. Pemberton used—we naturally took over that color,—and, further, from the fact that it is the cheapest paint you can buy, and one coat is sufficient for painting a barrel. There is no reason why we should change. The cola drink manufacturers paint the barrels and kegs containing their syrups red, except 'Gay-Ola.' In the last year or two I have noticed theirs is a little different color—I have seen one or two possibly—but all the rest are red."

F. M. ROBINSON, a stockholder and director in the Coca-Cola Co., and for 22 years its secretary; also a stockholder in the Pemberton Chemical Co. in 1886 and 1887 (Rec., 357) :

"Yes, sir, from July to October or November, 1887, 'Coca-Cola' was his (Pemberton's) principal product. * * * The thing he was pushing all the time was 'Coca-Cola.' I remember there were very few barrels shipped at that time, but I think *they*

were the same color as now,—they were painted red."

A. O. Murphy, of Barnesville, Ga., the only surviving partner of the old Pemberton Medicine Co., except J. C. Mayfield, in speaking of the barrels and kegs in which the Pemberton Medicine Co. shipped "Coca-Cola" from January 14th, 1888, to April 14th, 1888, and in which they thereafter shipped "Yum-Yum" and "Koke," said: (Rec., 1284):

"Those barrels and kegs, to my recollection, were painted *just common red*."

MISS MARION BLOODWORTH, daughter of E. H. Bloodworth, deceased (who was one of the original partners in the Pemberton Medicine Co.) speaking of the receptacles in which the Pemberton Medicine Co. at first shipped "Coca-Cola," and then, later on, "Koke," said (Rec., 1263):

"They had little kegs, I should call them, for shipping it out. *They were painted red*."

STEVE T. MAYFIELD, eldest son of J. C. Mayfield (Rec., 1457):

"At that time [1892] I was about nine years old, and I was in school in Atlanta, and on Saturdays I would go down to the place where they were engaged in the manufacture, and I remember on one occasion *I got a lot of red paint on my clothes,—I was fooling around the kegs,—*and used to get sugar down there and take it home and make candy."

T. C. BANKS, brother-in-law of E. H. Bloodworth, deceased, at whose house in Atlanta Bloodworth resided while connected with the Pemberton Medicine Co., said, in speaking of the Pemberton Medicine Co. (Rec., 1409) :

“They did not make ‘Coca-Cola’ very long. I went down to their place of business during the time they were making that. They were selling it, shipping it around and selling it to the soda fountains. They put it in small kegs and jugs that I saw. *The kegs were painted red.*”

L. A. HOLLEY, says that in about 1892 (Rec., 1275) :

“I went through his [Mayfield’s] place with him. The receptacles, as I remember, were kegs,—possibly some jugs. * * * These kegs were painted red.”

C. H. CRIMM, an insurance man, who met J. C. Mayfield in Atlanta in 1897, and who had an office next to his in the Norcross Building there, says that at that time Mayfield was manufacturing “Wine of Coca” and two other drinks of a similar nature and color. (Rec., 1040). He says that Mayfield had his manufacturing plant at the corner of Forsythe St. and Trinity Ave. at that time, and that he (Crimm) visited this plant frequently and saw Mayfield engaged in manufacturing these syrups (Rec., 1043-4). He further says (Rec., 1041) :

“I noticed barrels and kegs in his place of business. *The color of those barrels and kegs was red,—dark red.*”

GEORGE R. EDMONDSON, proprietor of two drug stores in Atlanta, says that he first met J. C. Mayfield about 17 or 18 years ago, in Atlanta,—about 1898 or 1900; that Mayfield at that time was engaged in the manufacture of a soda fountain extract similar to "Coca-Cola;" that he purchased some of that extract from Mayfield for several months before he left Atlanta, and continued to purchase it after Mayfield went to Birmingham. (Rec., 1299). In speaking of the receptacles in which the syrup was shipped, he said (Rec., 1299):

"The syrup came to us in little kegs,—possibly five gallon kegs. I think *they were painted red*,—that is my recollection."

P. B. McGRAW, a bottler at Gadsden, Ala., says he has been bottling "Koke" ever since 1900 (Rec., 1313), and that (Rec., 1315):

"The syrup would come to me about 28 gallons, and up as high as 40 and 42 gallons, in a barrel. *The barrels were painted red.*"

C. N. BAKER, a bottler at Newman, Ga., says that he began to bottle "Koke" "along in 1900 and something,—it has been a good while ago,"—and that (Rec., 1406):

"The syrup came to me in kegs, or half barrels, I do not know which now. *The containers of all the colas I ever received were red.*"

J. W. MAYFIELD, son of J. C. Mayfield (Rec., 1518):

"I went to Birmingham in 1898 or '99. I was in the syrup business then, making 'Koke,' 'Celery-Cola,' 'Pepsi-Nola,' and in the bottling business. I helped my father in that business. I did practically all the bottling, after I learned how, and did a lot of mixing, *painted the kegs*, and acted as shipping clerk. *I painted the kegs red.*"

OLIVER PRINCE (Rec., 1319):

"I worked for J. C. Mayfield about 1903 and '4, washing bottles, *painting kegs*," etc. "That was at South 20th St., in Birmingham. *I painted the kegs red.*"

G. W. FREEMAN (Rec., 1327):

"I knew J. C. Mayfield pretty well,—that was 1903,—'2, '3 and '4,—right along there. * * * I knew him on the South side,—20th St., right by the A. B. & A. depot. My place of business was just across the street from him. * * * I had occasion to go across to his place of business a good deal,—I was over there frequently. * * * I saw some barrels and kegs over there. It seems to me *they were painted red.*"

MRS. M. L. EDWARDS (Rec., 1336-7):

"I knew J. C. Mayfield. 'The first bottle of 'Koke' that I sold I bought from him in 1903, in East Thomas. At that time he was here in Birmingham. I had a little grocery store with drinks and fruits

at that time, at East Thomas, about 3 miles from Birmingham. Mr. Mayfield's place of business was on Morris Ave., between 20th and 21st at that time. * * * I went down to Mr. Mayfield's place of business a number of times. *They had lots of little red kegs around there.*"

A. S. JOSEPH (Rec., 1330-1):

"I first knew Mr. Mayfield in 1900 at Birmingham. He was manufacturing soft drinks, and shipping 'Hop Ale.' * * * I had occasion to go to Mr. Mayfield's place of business frequently * * * owing to the large amount of business we had with Mr. Mayfield in the delivery of what was known as car lots, consisting of one hundred packages, of 'Hop Ale,—delivering it, and, later, collecting on it. * * * I noticed a good many receptacles sitting around in his place of business when I was in there. *His packages were painted red.* * * * Mr. Mayfield continued manufacturing and selling that product 'Koke' during the time that I knew him,—from 1900 to 1907, when the brewery went out of commission."

W. B. ARNOLD (Rec., 1308):

"I knew J. C. Mayfield,—first knew him the latter part of 1905 down here on Morris Ave., Birmingham, Ala. He was engaged in the bottling business at that time, manufacturing 'Koke' and different drinks. * * * I went into the place where he was making this stuff,—into his factory down on Morris Ave. *I saw the syrup in barrels painted red.* * * * In 1908 and 1909 I ran a soda fountain in the Hippodrome skating rink on Third Ave.

'Koke' was the only cola drink I dispensed. * * * It came to me in little red barrels,—5 and 10 gallon barrels. *They were painted red.*"

CHARLES W. BURTON (Rec., 1323-4):

"He [J. C. Mayfield] was in business then [1906-7] on Harris Ave., between 21st and 22nd, here in Birmingham. I have been to his place of business frequently. I have seen him put up his syrup,—seen him have little kegs sitting around there, *little red kegs.*"

E. D. MONTGOMERY (Rec., 1357):

"I know J. C. Mayfield. I knew him here in Birmingham. * * * I was with him in 1908 in business, in his employ in 1908. I was what you could call, I reckon, a general man around the plant, in the shipping department, filling orders, and one thing and another,—bottling. Mr. Mayfield was making several different drinks. * * * He shipped syrup out to the trade. He shipped it in bottles and also in kegs. *The kegs were generally painted red.*"

A. F. WATKINS (Rec., 1377):

"I knew Mr. Mayfield,—first met him right here in the City of Birmingham. He was engaged in the bottling business,—manufacturing syrups. * * * I was over to his place of business quite a good deal. I saw barrels, kegs, and stuff of that kind. *They were painted red.*"

2

PRACTICALLY ALL THE OTHER COLA SYRUPS ARE MARKED IN BARRELS PAINTED THE SAME COLOR AS PLAIN-TIFF'S AND DEFENDANTS' BARRELS.

(a).—Testimony of Defendants' Witnesses.

LEE HAGAN, of the Hagan & Dodd Co., Atlanta, manufacturers of "Ko-Nut" and "Afri-Cola" (Rec., 1293):

"The barrels and kegs we ship our product in are painted red. I believe we have always used red paint. We had to paint them some color, and that is about as cheap a paint as you can buy. It is the most durable and attractive."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1090-1, 1098):

"In shipping my syrup, we ship it in barrels and kegs. They are usually red. * * * We paint our barrels that color because, in the first place, it is cheaper, I reckon, and, in the second place, the color of the barrels that nearly all syrups are sold in,—red barrels,—all syrups I have seen on the market, except 'Gay-Ola.' I think probably they had to change their barrels' color on account of some court decision. (Rec., 1090-1091). * * * I would not know a 'Coca-Cola' barrel by the red color. I did not know that the Coca-Cola Co. specifically had a patent or trade-mark on the color of their barrels. I never had heard of it. I buy the cheapest paint I can get." (Rec., 1098).

ADAM DIEHL, of Diehl & Lord, bottlers of soft drinks and manufacturers of "Star Cola," Nashville (Rec., 1084, 1088):

"We have shipped syrups in red barrels. When we were doing all of our own painting we painted them red because red paint was the cheapest. We get 'Digestol' and other drinks—'Jersey Creme,' and things like that—frequently in red barrels. I would know a 'Coca-Cola' barrel by the *head*—they *have* a *large paper label* that they paste on the head of a barrel—but I would not know a 'Coca-Cola' barrel by its *color*. * * * If there was *no label* on the barrel, I could not tell the 'Coca-Cola' barrel from any other barrel. (Rec., 1084). * * * Red paint was less expensive than any other kind, that was our experience. * * * The painter told us that red paint was the cheapest at the time." (Rec., 1088).

J. M. WARREN, president of the Warren Paint & Color Co., Nashville (Rec., 1166-9):

"I have sold paint to the Koke Companies. * * * I have sold them red barrel paint. This paint I sold them has no regular name, only it is a standard red, universally used by all concerns who have use for paint on barrels and packages of that sort. It is the cheapest paint you can buy, because the ingredients that go to make it up are the cheapest,—red oxide of iron, and, of course, oil. That has been a standard paint ever since I can remember,—oh, 18 years. That paint has been used mostly for painting barrels, and cooperage, and things of that kind. I sell it to all classes and trades,—any one that uses packages and barrels, we sell that paint to. I should judge 75 per cent of all paint that is used for bar-

rels is red, because it gives you more universal satisfaction and is cheaper paint. There is a paint known as 'Coca-Cola Red.' 'Coca-Cola Red' is a very expensive red, used mostly, from my knowledge, in painting *signs, bulletin boards, things like that*. We have matched some paint called 'Coca-Cola Red' sold to the local *sign men* here in town doing *sign work* for the Coca-Cola Co. This 'Coca-Cola Red' is a more expensive paint than this other one, because it is a very durable red, a brighter shade, and a special shade. There is no comparison at all between the red paint I sell the Koke Companies compared with the color of 'Coca-Cola Red.' One is a very bright vermillion, and the other is a mineral paint; one is a manufactured article, and the other a mineral dug out of the ground. The high priced or 'Coca-Cola Red' is a manufactured and chemical paint,—the color is made from chemicals. A barrel painted 'Coca-Cola Red' and another of the cheaper grade would look entirely different—you could distinguish them in a minute. 'Coca-Cola Red,' as I know it, is a very bright shade of vermillion, and the other is what we call 'English Venetian Red,'—very much darker shade. * * * 'Coca-Cola Red' is a true shade and has a good rich tone to it, whereas the other has a muddy color. * * * The 'Coca-Cola' people use on their *barrels* the regular *standard 'English Venetian'* paint. They do not buy from us, but it is the same kind of red all manufacturers use—they look alike, and I could not tell the difference between them. They *do not* use 'Coca-Cola Red' on the *barrels* to my knowledge. [Compare, for instance, the color of *Defendants' Exhibits 278 and 279*, two Coca-Cola kegs, with the color of *Plaintiff's Exhibit 17*, an enameled metal sign board used in advertising "Coca-Cola."] * * * Our repre-

senative called on the Central Koke Co. at Chattanooga and in the conversation told him what kind of paint we had, etc., and he bought five gallons to try. Nothing whatever was said about the *shade*, he just bought five gallons of our *standard red barrel paint*, and we sent it to him, and since that time have been getting the orders. The *price* was the reason he bought from us, probably. I think it was *cheaper* than the paint he had bought before."

W. M. POLLOCK, proprietor of the Nashville Bottling Works, Nashville, Tenn., and bottler of "Fletcher's Cola" (Rec., 1199):

"I have bottled other cola drinks. I have bottled 'Coca-Nola,' 'Rye-Ola,' 'Gay-Ola,' 'My-Ola,' 'Star-Cola,' and bottled other drinks. * * * The color of the barrels I get the cola drinks in I am now bottling is red. I have gotten different cola drinks in red barrels. 'Gay-Ola' was in red barrels when we bottled it, if I am not mistaken. 'Coca-Nola' was in red barrels, I am quite sure. Diehl's 'Star-Cola' is in red barrels. Almost all cola drinks I have bottled come in red barrels."

C. N. BAKER, bottler of soft drinks, Newman, Ga. (Rec., 1406-7):

"I could not name all the different colas I have bottled. * * * The containers of all the colas I have ever received were red. * * * The syrups for all these different drinks came in barrels and kegs. They were painted red."

C. J. THORNTON, proprietor of the Corner Drug Store, Hattiesburg, Miss.:

"I have sold 'Afri-Cola,' 'Coca-Cola,' 'Dope,' 'Ko-Nut,' 'Luck-Ola.' (Rec., 1759). * * * These various cola syrups come in red barrels and kegs. I never got a syrup or an extract for a cola beverage that did not come in a red barrel or keg." (Rec., 1760).

DR. H. O. NULL, a practicing physician and retail druggist, Chattanooga (Rec., 1063):

"The syrup for the different cola drinks come in just ordinary barrels, so far as I have noticed them, all painted red. I do not believe I could tell a 'Coca-Cola' barrel, by its *color*, if I did not see the *label* on the barrel. * * * I do not think I could distinguish it, by its *color*, from the barrels in which other syrups have been shipped. I do not think there is any difference in them."

A. W. STANLEY, proprietor of the Stag Hotel and Bar, Chattanooga (Rec., 1004-5):

"I do not know as I could tell a 'Coca-Cola' barrel if I saw it, because a great many other barrels are the same color. * * * We used to get Catawba wine in barrels painted red."

A. F. ENSINGER, bartender, Chattanooga (Rec., 986):

"I would not know a 'Coca-Cola' barrel if I saw it, *unless it was labeled*. I used 'Coca-Cola' barrels for about five or six years, but I did not see any

difference in the barrel from that of any other barrel, *unless there is a label on it.* * * * I could not tell any difference in the *color.*"

F. M. BOGART, a drug clerk and soda dispenser, Chattanooga (Rec., 1070):

"We serve 'Coca-Cola,' 'Ko-Nut,' 'Afri-Cola' and 'Mays-Ola.' The syrups for the different drinks come in barrels. The color of the barrels is red. * * * I do not know as I could tell a 'Coca-Cola' barrel from the other barrels,—if I could not see the *label* on it,—by its *color.*"

WILLIAM F. DAVIS, president of the Davis-Fuston Drug Stores, Nashville (Rec., 1103):

"These different cola drinks we buy sometimes in barrel lots, some times in half barrels, and occasionally in five gallon containers. The color of the barrels the different drinks come in is a red,—muddy reddish color."

PAUL E. WEBB, soda dispenser, United Cigar Stores, Nashville (Rec., 1119-20):

"I have dispensed 'Fletcher's Cola' 'Diehl's 'Star-Cola,' and some other names. I do not remember the names of them. I am dispensing now 'Coca-Cola' only. I have dispensed other cola drinks in addition to 'Coca-Cola' at various other places I have worked. * * * Other cola syrups come in red barrels."

J. C. PRICE, proprietor of a restaurant, but formerly a soda dispenser, Nashville (Rec., 1205-1207-8):

"There are many different brands of cola drinks I have served. I could not call them all, I know a few: 'Arrow-Cola,' 'J. D. F. Cola,' 'Koke,' and 'Cola,' 'Gay-Ola,' 'Afri-Cola, * * * 'Star-Cola,' and 'Gersts' Cola,' too, and 'Coca-Cola.' (Rec., 1205). * * * These various cola drinks I have referred to most all came in red barrels. The Coca-Cola Co. had a barrel that was very close to it, the paint was. * * * I do not think I could tell the difference just at a glance." (Rec., 1207-8).

H. F. CRISLER, retail druggist, Jackson, Miss. (Rec., 1430):

"The only three syrups I have handled were 'Ko-Nut,' 'Dope,' and 'Coca-Cola.' They all came in red barrels."

HENRY BOERGER, proprietor of the Chattanooga Bottling Works, Chattanooga, Tenn. (Rec., 969):

"The color of the barrel the 'Gay-Ola' syrup came to me in was red. I think the color of the barrel the 'Star-Cola' syrup came to me in was red."

R. F. ZIMMERMAN, proprietor of the Union Bottling Works, Chattanooga, which bottles "Tru-Cola" (Rec., 981):

"We get the syrup ['Tru-Cola'] from the National Syrup Co., then we bottle it. It comes in a kind of reddish barrel,—supposed to be red, I think."

BURTON JONES, a retail druggist, Chattanooga (Rec., 1006):

"We get 'Tru-Cola' in a red barrel,—the syrup comes in red barrels."

C. P. EMBREY, a retail druggist, Chattanooga (Rec., 1019-20):

"[The] cola syrups I have handled come in red barrels. * * * I could not tell a 'Coca-Cola' barrel if I saw it *and did not see the label* on the end of it, because they are all colored red, about the same thing."

J. M. WHEELER, a bartender, Chattanooga (Rec., 972):

"I would not know a 'Coca-Cola' barrel if I saw it, unless there was *lettering* on it."

R. L. WAYMAN, a bartender, Chattanooga Rec., 1016):

"I would not know a 'Coca-Cola' barrel if I saw it. All I would go by would be the *name* on it."

R. K. SMITH, head dispenser at the United Cigar Stores Co., Nashville (Rec., 1190):

"I could tell a 'Coca-Cola' barrel, *if it was labeled 'Coca-Cola.'* * * * I have not seen the wagons delivering syrups to the soda fountains around town. It is not customary in this city for soda

fountain people to leave their empties sitting out on the sidewalk in front of their places."

M. J. COSTELLO, a bartender, Chattanooga (Rec., 1000):

"I have not noticed barrels of 'Coca-Cola' sitting on the sidewalk in front of soda stands around town."

(b).—Admissions of Plaintiff's Witnesses.

FREDERIC CONWAY PEACE, an ex-Pinkerton detective, employed by the Coca-Cola Co. to help work up this case (Rec., 2213-16):

"Yes, sir, I have gone around investigating the barrels at different soda fountains to see what dealers were handling. You asked me how many different kinds of cola drinks I have discovered in barrels at the different soda fountains I have been to; why, 'Ko-Nut,' and 'My-Coca' are the two principal ones—'X-O,' that is another one. I understand it is made in Baltimore, or some place in Virginia. * * * I am very familiar with the 'Ko-Nut' barrels and 'Koke' barrels. * * * I notice all the barrels particularly, but these are the most prominent ones. I have seen barrels in which 'My-Coca,' 'Wise-Ola,' and 'Rye-Ola' is shipped, and I was able to tell the difference between these various barrels and 'Coca-Cola' barrels *because 'Coca-Cola' barrels were always labeled 'Coca-Cola'*—great big labels on either end. (Rec., 2213). *That is the only way I could tell the difference between them.* * * * 'Wise-Ola' barrels and the barrels used by the Southern Koke Co. are the same color practically speaking, as the 'Coca-

Cola' barrels, and so are the 'My-Coca' barrels, but the 'My-Coca' barrels bear a great big label, almost as large as the 'Coca-Cola' labels. All I ever saw of them were labeled 'My-Coca.' (Rec., 2214). * * * Yes, sir, I have seen 'Koke' barrels in railroad stations. You ask if I recognized them right off as 'Koke' barrels; * * * I could not tell whether they were 'Koke' barrels or whether they were *some other kind of syrup barrels*. I recognized them as *syrup barrels*. They looked like *the standard syrup barrels used for syrups*." (Rec., 2215-2216).

HOKE SMITH LEIGH, a traveling salesman in the employ of the Coca-Cola Co. (Rec., 2235-6):

"No, sir, I could not tell by looking at the barrel I thumped—the substitute barrel—what kind of barrel it was, because I do not recall that it had any *label* on it. You ask if it requires a *label* to distinguish the barrels one from the other in my mind; well, if there is any doubt. You ask if there is ever any room for doubt, and if I ever ran across an occasion to doubt, except from seeing the *labels*, or the absence of it; I see a lot of red barrels that do not have labels and I always doubt it right away. You ask if I could tell the difference in the barrels, except by the *labels* on them; I generally know. The boys in the factory mark them with a black mark, and I sometimes distinguish them *that way*, but *I look to the label more than anything else*. You ask if, aside from the *marks* and *labels*, there is any way to distinguish one from the other; I do not know. * * * When in doubt it will be settled in my mind by the 'Coca-Cola' label. You ask if I can distinguish the *color* of the 'Coca-Cola' barrel from all these other barrels; I did not say necessarily it could

be done. * * * You ask if I could tell, just by looking at the barrel, *without seeing the label; not to get right down to the point of distinguishing one from the other.* * * * All these substitute barrels look just about alike, all I have seen or noticed. It is pretty hard to tell one of those from the others." (Rec., 2235-2236).

CLAUDE W. HICKEL, drug clerk, Charleston, West Virginia, but formerly a soda dispenser in Ocala, Florida (Rec., 2062-3):

"The way I distinguish the 'Coca-Cola' barrels from those other barrels I mentioned is because they always *label* them. (Rec., 2062). * * * The *only difference* in my mind between the barrels I have seen these *other* drinks I have mentioned come in, and the 'Coca-Cola' barrels, is that the 'Coca-Cola' barrels that came to the Post Office Drug Store were all *labeled*—they had big labels on the head of the barrel. Why, yes, *that was the only way I could tell the difference between the 'Coca-Cola' barrel and the barrels containing these other drinks.*—they were very similar." (Rec., 2063).

CHARLES KINGSBURY (Rec., 466):

"The way I distinguish a 'Coca-Cola' keg is that *it has a great big name on it.*—'Coca-Cola.' No, I don't know that I could distinguish it *in any other way*, or that I could distinguish it by its *color.* * * * The reason why I know it when I see it is *because it has 'Coca-Cola' on it.*"

GEORGE J. MARTIN, traveling salesman for the Coca-Cola Co. (Rec., 344):

"Yes, I have noticed the kinds of barrels that 'Ko-Nut,' and 'Afri-Cola' are shipped in—in fact, it is just as near an imitation of the 'Coca-Cola' barrel as they could get, so far as I could see,—a red barrel, minus the label. Yes, I have seen other so-called cola beverages, or caffeine-containing soda fountain beverages, shipped in barrels of the same color as 'Coca-Cola.' "

J. F. REDING, a retail druggist, Atlanta, Ga. (Rec., 480):

"Yes, sir, I have seen red barrels, other than 'Coca-Cola' barrels. I do not recollect where I have seen them, but I have seen red barrels, though."

ASA G. CANDLER, president of the Coca-Cola Co. (Rec., 383-4):

"Oh, yes, there is a drink called 'Afri-Cola.' I have heard of it frequently. Yes, sir, I think I have seen it,—I know I have. * * * It is sold in barrels whenever they can. (Rec., 383). * * * Yes, sir, there is a 'Ko-Nut,'—that's run by the same gang, I think. * * * Yes, sir, I think that is sold in red barrels, too,—the only way I know. I see red barrels traveling around town * * * and they tell me it is 'Afri-Cola.' " (Rec., 384).

SCHEDULE VII.

The Soda Water Bottle.

1

Physical Exhibits.

The best evidence that the size, color, shape, design and general appearance of the soda water bottles used by plaintiff for bottling the several beverages made from its syrup do not in any wise serve to identify or distinguish plaintiff's bottles from the bottles containing the similar products of others, is the bottles themselves in which the various brands of soda water are marketed. See *Defendants' Exhibits 1, 2, 3, 4, 6, 43 to 54 inclusive, 189 to 213 inclusive, 215 to 223 inclusive; plaintiff's exhibits 153 to 160, inclusive, 187, 188 and 191; and plaintiff's rebuttal exhibits 68 to 77, inclusive.*

2

Testimony of Defendants' Witnesses.

HENRY BOERGER, president of the Chattanooga Bottling Works, Chattanooga (Rec., 967-8):

"When I first bottled 'Coca-Cola' we used the Hutchinson stopper—that is a different shaped bottle—but for the last ten years we have been using the crown stopper bottle nearly altogether. The crown stoppered bottle we have been using is the same shaped bottle that other drinks are put up in.

* * * I would not know a bottle of 'Coca-Cola' if I saw it, by the color, shape or size, although some bottles are a different size from the 'Coca-Cola' bottle. * * * There are lots of other bottles that have the same shape as 'Coca-Cola.' "

LEE HAGAN, of Hagan & Dodd, manufacturers of Ko-Nut and Afri-Cola, Atlanta (Rec., 1297):

"Prior to the time I bottled 'Ko-Nut,' I bottled 'Dixie;' that was put up in the old Hutchenson stoppered bottle, before the crown bottle came in use. The crown bottle came in use about fourteen years ago, I think, here in Atlanta. A good many bottles have a special shape of their own, but the bottle used by the 'Coca-Cola' people at this time is very similar to the soda bottle used twenty-five years ago by all bottlers for bottling a general line of soda water."

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville (Rec., 1093):

"I do not think I ever saw a [cola] beverage not put up in a bottle of the same general appearance and size as the one in which 'Coca-Cola' is put up. Those bottles, the color and taste of the drink, are common to the trade."

J. C. McDONALD, a bartender, Chattanooga (Rec., 1068):

"I have never seen a cola drink not practically the same color as Coca-Cola and practically the same

taste, or that was not put up in a bottle of the same general design as the 'Coca-Cola' bottle."

A. W. STANLEY, proprietor Stag Hotel and Bar, Chattanooga (Rec., 1004):

"These drinks were put up in bottles. They are all about the same, all black bottles. I cannot distinguish a 'Coca-Cola' bottle from a bottle of these other cola drinks that I know of, unless I saw more than that—the *name blown in the glass*. * * * My recollection is that they are all about the same kind of bottle."

JOE QUINN, a bartender, Chattanooga (Rec., 991-2):

"All the different drinks I have handled and know of have been bottled. The bottles all look the same. I do not know that I could tell one from the other. I could not distinguish a bottle of 'Coca-Cola,' *without the crown on it*."

TOM COLLINS, steward of the Eagles' Club, Chattanooga (Rec., 988-9):

"If I saw a bottle of 'Coca-Cola' sitting on the counter, from the size of the bottle, the color, shape, and general appearance of the bottle, I could not tell whether or not it was a bottle of 'Coca-Cola' or a bottle containing some other cola beverage. The bottles look about the same to me,—that is, the 'Coca-Cola' bottles and the cola bottles."

A. F. ENSINGER, a bartender, Chattanooga (Rec., 985):

"The bottles of the different soft drinks I handle, compared as to size, shape, general appearance, etc., with the bottles in which 'Coca-Cola' is put up, are all pretty much the same shaped bottle and color. * * * I would not know a bottle of 'Coca-Cola' by its *size, shape, color*, or its *general appearance*, *unless* I saw the *name* on it. The majority of bottles are all pretty much the same size, shape, and color, and I could not distinguish them *unless I had seen the name.*"

E. W. FREEMAN, a bartender, Chattanooga (Rec., 974-6):

"I would not know a bottle of 'Coca-Cola' by its *size, shape, and general appearance*, *unless it had 'Coca-Cola' blown in it*, or something like that. (Rec. 974). * * * I have never seen a cola beverage that was not the same general color as 'Coca-Cola.' They generally taste about alike to me, and are put up in the same general style of bottle, color and all."

J. N. WHEELER, a bartender, Chattanooga (Rec., 970, 972):

"The size, shape, and general appearance, etc., of the bottles that these other cola beverages are put up in, compared with the 'Coca-Cola' bottle, are very much the same thing. (Rec., 970). * * * I would not know a bottle of 'Coca-Cola' if I saw it, and *did not see the name of 'Coca-Cola' on the side of the bottle.* It is pretty much the same bottle as

the other cola drinks—the same shape—and, *if you do not see the lettering on it*, I do not suppose you could tell the difference. * * * The size, shape and general appearance of the 'Koke' bottle used compare pretty much the same with those used generally in the trade for other cola beverages." (Rec., 972).

M. J. COSTELLO, a bartender, Chattanooga (Rec., 1000):

"All cola drinks I have known of have been put up in bottles. The shape, size, and general design and appearance of the bottles of these other cola drinks, compared with the bottles of 'Coca-Cola' are very much alike,—there is very little difference in any of them. * * * I could not distinguish a bottle of 'Coca-Cola' from these other drinks, *unless I saw the crown, or name blown in the side of the bottle.*"

W. F. STRICKLAND, a bartender, Chattanooga (Rec., 1048-9):

"These drinks are put up in bottles. The general size, shape, and appearance of the 'Maud Muller' bottle and this Zimmerman stuff I spoke of, as compared to the size, shape, and general appearance of 'Coca-Cola' bottles, all look about alike—some times the bottlers would blow their names around the top. (Rec., 1048). * * * Some of the bottles have a name in them, like '*Chattanooga Bottling Company*,' but you have to get up close to read them. They are all the same size and * * * look like a 'Coca-Cola' bottle. The 'Coca-Cola' bottle has '*Coca-Cola Bottling Company*' on it. I believe it is on the bot-

tom, '*Trade-Mark Registered*' or something like that—great big '*Coca*' and another '*C*', and the rest of the letters small."

LUKE POGUE, a bartender, Patten Hotel bar, Chattanooga (Rec., 1060-1):

"The name '*Coca-Cola*' is on the '*Coca-Cola*' bottle. Some of the others have names on the bottles and some do not. There is no way for our customers to know, when they come and ask for a 'dope,' the drink they are getting without it is '*Coca-Cola*.' '*Coca-Cola*' uses their own bottles, and these other coke companies—most of them use bottles they pick up, almost all of them, and you might get a case with a dozen different names on the bottles."

W. F. BOYLIN, president of the American Label Works, Nashville (Rec., 1075-6):

"I do not think I have seen cola beverages put in anything except six and seven ounce split bottles. Most all I have ever noticed are dark brown bottles."

F. E. HOOPER, a retail grocer, Chattanooga (Rec., 997):

"These cola drinks all pretty much the same thing as '*Coca-Cola*,' all in dark bottles, and all look alike.
* * * They are dark bottles pretty near the same size, and pretty near the same as the '*Coca-Cola*' bottles."

CHARLES W. BURTON, a lunchroom proprietor, formerly a bar tender, Birmingham (Rec., 1324):

"The bottles of these different cold drinks have a similarity—all about the same size, round—and I have seen them, as I say, in both clear and amber bottles, just one way and then another. In fact, I have seen mixed cases of bottles, the bottles being mixed in the case."

H. L. FISHER, engaged in the wholesale liquor business, Birmingham (Rec., 1346):

"These cola drinks are all labeled—most of them have the *name on the cap*."

C. N. BAKER, a bottler, Newnan, Georgia (Rec., 1407):

"There is no difference in the bottles of these different drinks, any way, *except the name blown on them*."

3

Admissions of Plaintiff's Witnesses.

CHARLES HOWARD CANDLER, vice-president and general manager of the Coca-Cola Co. (Rec., 396):

"The Coca-Cola Co. first began to make bottling syrup in 1898, and that is when 'Coca-Cola' first began to be bottled."

H. B. PIERCE, chief detective for the Coca-Cola Co., in charge of working up the facts in this case (Rec., 2136, 2130-2, 2140-1):

"Sure, I know a 'Coca-Cola' bottle when I see it. No, *it is not a distinctive bottle*. No, *it is not distinctive*. No, 'Coca-Cola' *hasn't a distinctive bottle*,—not in its present form. It is distinctive in as much as it has the *trademark* 'Coca-Cola' blown in script in some part of the bottle, and *that is the thing that distinguishes it from all the other bottles on the market*—not *all* the bottles, there are *some* bottles that bottles that have a *different* size and shape. Rec., 2136). * * * It ['Chero-Cola'] is about the same color as these other drinks, and is put up in bottles almost identical in size with the 'Coca-Cola' bottles, and has a cap on it about the same size as the 'Coca-Cola' cap, and just at a casual glance would look about like a bottle of 'Coca-Cola.' (Rec., 2130). * * * I believe that 'Chero-Cola' bottles habitually have a *label* on them. The label is a *bright* yellow with the *name* 'Chero-Cola' on there in red. (Rec., 2131). [Same color cheme as defendants' bottle label. See *defendants' exhibit* 123]. * * * All of the other cola drinks I have known of all have about the same color, and are put up in about the same kind of bottle, and have pretty much the same general taste." (Rec., 2132). I am acquainted with the size, shape and general appearance of the bottles in which 'Coca-Cola' is bottled and sold in Atlanta, Georgia. I believe it is a six and one-half ounce white bottle. I do not remember to have seen cola drinks served in bottles of any other shape besides that. Amber bottles are used by some of the bottlers of 'Coca-Cola' up in the northwest territory. * * * I believe the bottlers of these various cola drinks use various sized bottles. You ask if I have ever noticed any of these cola drinks offered to a customer in bottles which differed in size, shape, and general appearance from Coca-Cola bottles; I never particularly noticed that. (Rec., 2140). * * * You ask if there is any

way of telling, from the size, shape, color, design, and general appearance of the bottle, whether or not it contains 'Coca-Cola,' or one of these fourteen or fifteen drinks which I have mentioned; the licensed bottlers of 'Coca-Cola' always use the *trade-marked* 'Coca-Cola' bottles, and *that is the way I distinguish those from the other drinks.*"

GEORGE H. WILKINS, private detective from the office of Edward S. Rogers, Esq., Chicago (Rec., 887, 888, 885):

"You ask if I don't know that the bottle marked *plaintiff's exhibit No. 187*, [a bottle of 'Koke'] is about the same size and shape bottle that is used generally in the trade, in the soft drink business, for nearly every kind of carbonated soft drink that is on the market; well, no, I could not testify as to that. I don't know what bottles they have used. Until I work on a case I do not pay much attention to the exact type and size of bottles. But I know these bottles, 'Coca-Cola' and 'Koke,' are about the same as a great many bottles I have seen that do not contain 'Coca-Cola' and 'Koke.' (Rec., 887) * * * Most of the soft drinks I got at Fort Worth, Dallas, and New Orleans were in this general style of bottle, but I do not know them as being 'Coca-Cola' bottles. It is a bottle similar to this bottle, *Exhibit No. 187*. ...*I do not believe I could tell, from the shape of the bottle, what was in it.* Rec., 888) * * * Of course, I do not know of my own knowledge who bottled these products [Plaintiffs exhibits 187, 188, 189, and 191], only by [the] *labels on the bottles.*" Rec., 885).

GEORGE J. MARTIN, a traveling salesman in the employ of the Coca-Cola Co. (Rec., 345):

"Yes, I have drunk 'Koke'. Q. You could tell right off it was not 'Coca-Cola', couldn't you? A. Well, of course, I got it out of a '*Koke*' bottle. * * * If he had given it to me, and *I hadn't seen the label on it, I don't know what I would have thought.*"

C. J. HOGAN, a Pinkerton detective employed by the Coca-Cola Co. to get up evidence in this case:

"We have produced all the 'Koke' that was offered us for 'Coca-Cola'. You say you take it for granted that we were *not deceived* when we got it; why, *sure not*. * * * *Sure we knew what it was when we got it.*" Rec., 649-650).

B. J. GILLON, another Pinkerton detective employed by the Coca-Cola Co. to help work up the facts in this case:

"In each place we went to we called first for a glass of 'Coca-Cola' and they served us out of the bottle—they poured it out of the bottle into the glass—and we drank from the glass. They gave us a drink which we drank in each instance. When we drank the drink, we asked for a bottle of that drink under some circumstances, and under other circumstances we did not ask for it. In each instance I saw the drink which was served to us, in the bottle in which it was served, and, in those cases where we got the drink in a glass, I knew what the bottle contained before I drank the stuff, so I was *not deceived* at any time by what I drank. In each instance where I ordered a drink and got it in a glass, and followed it up by an order of a bottle, in each such instance *I saw that it was a bottle of 'Koke'* that had been served me in the glass before I ordered it; and, in

each instance where I failed to order a bottle to take away with me, *I was satisfied it was 'Coca-Cola.'*" (Rec., 661-662).

I. B. DRAWLEY, one of plaintiff's spotters (Rec., 2150):

"We went to two stores of the Nashville Drug Co. and at both of them they served bottled 'Coca-Cola.' I knew it was bottled 'Coca-Cola' *because it had 'Coca-Cola' on the crown.* I recognized it right off as 'Coca-Cola.'"

C. C. ROSS, another of plaintiff's spotters (Rec., 2174-6):

"You ask how I know that the bottles which we got at the three drug stores mentioned were bottled 'Coca-Cola'; well, they were *labeled 'Coca-Cola,'* and had *Crowns* on them,—'*Coca-Cola,*' and '*Coca-Cola*' *was blown into the bottles.* Yes, sir, I have seen bottles containing other cola drinks. You ask what cola drinks; well, I have seen a great many cola drinks—I have seen several of them, for instance, 'Chero-Cola,' 'My-Coca,' 'Parafait,' 'Chas.-Cola,' 'Rivo-Cola.' I could study up some more, but that is all I can think of right now. * * * No, I cannot distinguish 'Coca-Cola' from the *bottles* in which these other drinks [are bottled]. I cannot tell it by the *color.* * * * If they put out sarsaparilla in 'Coca-Cola' bottles I do not expect I could tell it by looking at it. (Rec., 2174-2175-2176) * * * You ask if the 'Coca-Cola' bottles are uniform; in some places they use a bottle like that (indicating a flint bottle) and in some places they use a dark bottle or brown bot-

tle. * * * In Nashville, I believe, it is a brown bottle. Then, there is a kind of blue bottle, some of them have in some places."

NORVILLE N. LEAVER, manufacturer of "Orin-Cola," St. Louis, Mo. (Rec., 2037):

"Some 'Coca-Cola' has blue glass bottles,—green glass, rather,—and it is a little bit smaller on the top than mine. * * * In my experience there is half a dozen styles on the market in the City of St. Louis." (Rec., 2037).

SAMUEL C. DOBBS, vice-president and sales manager of the Coca-Cola Co. (Rec., 323-4):

"I have seen 'Coca-Cola' bottled in eight ounce bottles and in seven ounce bottles. * * * When it originally started the bottles held about eight ounces, but they have been gradually eliminated,—we have been gradually eliminating that. We had lots to learn when we started the bottling business. For the past several years the 'Coca-Cola' bottles have all been tending toward that particular shape. Oh, there have been differences in the past, yes, and it is still sold in bottles of different shapes. Some of the bottling plants are using the amber bottles, but the proportion of them is small, and it is a thing we have objected to and are rapidly getting cleaned out. * * * It was not in 1911,—I think it was later,—I don't recollect now,—but there was a meeting of the bottlers held here in Atlanta to adopt a uniform bottle. * * * The reason we wanted a uniform bottle was to protect ourselves against infringements. There would never have been any necessity to adopt

a uniform bottle if they had all been uniform before that."

A. B. FREEMAN, manager of the Coca-Cola Bottling Co., New Orleans, La. (Rec., 642-5):

"Mr. Hirsch asked me, as I understood the question, if *plaintiff's exhibit 111* * * * was a 'Coca-Cola' bottle. I replied that it was, * * * as used by us. (Rec., 642). * * * Up to the time of the 1911 convention that bottle had not been adopted. You ask if I did not testify in the '*Glee-Nol*' case that a bottle of that general shape and make had been generally used for various drinks, and that I, myself, had bottled 'Grapine' in such a bottle, and you say that you showed me a bottle, if I recollect; I could not have testified that positively, Mr. Dart, because that particular bottle was a result of this conference between the bottlers and the Coca-Cola Co. that you refer to—that bottle was not in existence before-hand. Yes, sir, it is true that a bottle bearing the label 'Coca-Cola' had been generally used by our bottling company, anterior to the convention of bottlers which I speak of in 1911, for bottling other drinks than 'Coca-Cola,' but not that particular bottle, because that particular form and shape of bottle was adopted by that convention, * * * You say you showed me a bottle of 'Grapine' during the '*Glee-Nol*' trial, bottled in a bottle exactly like this, and ask me if I do not remember it; I do not recollect that particular bottle. I do not say that you did not,—there were quite a number of bottles shown me for identification. * * * 'Grapine' is about the same shade of color as sarsaparilla and 'Coca-Cola' * * * it has about the same general appearance and color. Anterior to this convention of bottlers that I speak of, the 'Coca-

Cola' bottle had the trade-mark blown in all over the bottle in various positions—that is, there was no particular place where they blew in the name 'Coca-Cola.' The trade-mark itself was uniform, but it was not uniformly blown in the same place on every bottle. (Rec., 644). * * * Yes, sir, you exhibited a number of bottles to me and I recognized them as *various types of* 'Coca-Cola' bottles that were used prior to the adoption of the standard bottle." Rec., 645).

T. C. LUPTON, manager of the Coca-Cola Bottling Co., Dallas, Texas Rec., 786-7):

"You ask if the bottle which you hold in your hand, *plaintiff's exhibit* 154, is a 'Coca-Cola' bottle; no, sir, that is a soda water bottle.

"Q. Then, what you meant was—when you answered my previous question about 'Brew' being in 'Coca-Cola' bottles—you meant in a bottle which contained the trade-mark blown on the shoulder of the bottle? A. That is right, Judge.

"You say that nobody would mistake the bottle which you hold in your hand (*exhibit* 153) for a 'Coca-Cola' bottle; well, Judge, some people, you know, could be mistaken in it,—it is the *size* of the 'Coca-Cola' bottle, but it has not the *trade-mark*. No, sir, the bottle you hold in your hand is not like a 'Coca-Cola' bottle except for the fact that the word 'Coca-Cola' is not blown on the shoulder. No, sir, it is not like a 'Coca-Cola' bottle. You ask how it *differs* from a 'Coca-Cola' bottle—well, Judge, it is a little bit taller, it is built a little different from 'Coca-Cola' bottles. You ask me, then, how it is that I say people would *mistake* this *exhibit* No. 153

for a '*Coca-Cola*' bottle; well, they hold the same, Judge, they hold the same amount.

"Q. I asked you why you swore that that bottle, No. 153, not being a '*Coca-Cola*' bottle, could ever be *mistaken* for a '*Coca-Cola*' bottle; why did you swear that? A. Well, Judge, *they could be mistaken*, according to my judgement, because the '*C-C's*' on it, they would take that for a '*Coca-Cola*' bottle,—could do it, couldn't they?

"You ask who would; I say, anybody drinking it, it is about the *shape* of the '*Coca-Cola*' bottle. I believe, Judge, that *anybody* looking at that bottle, No. 153, *would be liable to take it for a 'Coca-Cola' bottle*.

'Q. In other words, *it would take an expert like you*—A. No.

"Q. *To pick out a 'Coca-Cola' bottle from one of the soda water bottles?* A. *Yes, it is hard, Judge, it is hard, no doubt about that.*

"Q. About as hard a task as sorting out black-eyed peas one from another? A. I did not say black-eyed peas, but *it is a hard job.*" (Rec., 786-787).

SCHEDULE VIII.

The Dispensing Bottle.

J. A. HODGE, manager of the Illinois Glass Co.,
Dallas, Texas (Rec., 156-8):

"Defendants' exhibit 223 is a stock bottle that we carry in stock. It is not a special design made for any particular concern; it is what we call a machine made dispensing bottle,—the only form of the kind we have. We had never sold that to the Coca-Cola Co. We sold the Jersey Creme Co., in Fort Worth, and Hughes Bros., in Dallas, A. M. Brown in Dallas, and sold to the various decorators for stock packages. Some of the decorations that have been on there were: 'True-Cola,' for Hughes Bros.; 'Koke,' for the Koke Co.; 'Howel's Orange Juice' and 'Grape Juice' for the Jersey Creme Co. That is the cheapest thing we have. I have sold some of these bottles to the Koke Co. of Texas. I have a copy here of our invoice—the only one we ever entered—one bill which went forward from the house on June 16, 1913. *Defendants' exhibit 224* is a carbon copy of the bill sent over at the time the shipment was made. * * * *Defendants' exhibit 225* is the bottle we sold the Koke Company of Texas. There is a mark on the bottle showing it is an automatic machine made bottle,—the peculiar mark at the end of the glass where it is cut off. The automatic machine makes that mark on every bottle, and no other kind of bottle has that kind of a mark on it. * * * He [the representative of the Koke Company of Texas] told me he was getting up this company and was going to use a bottle. * * * He did not tell me anything about any particular design,—just the cheapest thing we had,

—and this, as a matter of fact, is the cheapest. We formerly made this bottle by hand, and it ran as high as \$18.00 a gross, and then, when we made it by machine—machine made bottle—it took off 33 1-3 per cent in price. * * * 'The other styles are more expensive than this; they are made by hand.'

J. C. MAYFIELD, Sr., president of the Koke Company of America (Rec., 1635):

"The dispensing bottle marked *defendant's exhibit* 173 is a sample of the dispensing bottle purchased by us and used by the Koke Companies,—that was furnished dealers. I did not pick out the design of dispensing bottle,—just sent them,—that is, the local representative of the Illinois Glass Works here,—gave him my label and told him I wanted a dispensing bottle, one of their stock dispensing bottles, and wanted my 'Koke' on there, and that is the bottle they shipped me. That is the cheapest bottle they had."

C. H. JOUETT, associated with the Live & Let Live Drug Co., Chattanooga, but formerly drug clerk at the Miller Pharmacy, Chattanooga (Rec., 1052-3):

"At the Miller Pharmacy the syrups for the different drinks they had were kept in dispensing bottles, tanks and pump jars. * * * They [the dispensing bottles] were of the *same shape*, and they were *labelled* so we would know them one from the other." (Rec., 1052-1053).

GEORGE H. WILKINS, the private detective from the office of Edward S. Rogers, Esq., in referring to one

of defendants' dispensing bottles which he saw in the office of J. H. Van Winkle, the manager of the Koke Company of Texas, said (Rec., 873):

"I saw a bottle standing on Mr. VanWinkle's desk which was *the ordinary type of dispensing bottle commonly used at soda fountains.* * * * On the face of the bottle, blown in on the lable, was the word, 'KOKE,'—'K-O-K-E.' "

There is no evidence the other way.

The only testimony plaintiff has produced with respect to dispensing bottles at all, is as follows:

SAMUEL C. DOBBS (Rec., 319-20):

"The Coca-Cola Company furnishes dispensing bottles, a sample of one of which is shown by Exhibit 59."

SCHEDULE IX.

The Label.

"The only evidence plaintiff has offered to substantiate its oft repeated assertion that its bottle label is distinctive, is the testimony of Samuel C. Dobbs, its vice-president, as follows (Rec., 322):

"Exhibit 61 and 62 are labels used on 'Coca-Cola' bottles. This particular form has been in use since 1907. Previous to that time we used a label similar in shape, but read in color."

J. C. MAYFIELD, Sr., president of the Koke Company of America, says (Rec., 1628):

"We have had various sizes and kinds of labels, but have not adopted any particular size or shape."

Specimens of a few of the several different kinds of labels the defendants have used are shown by the following exhibits (The first column shows the number of the exhibit; the second, what the exhibit is, and the third the page of the record where it is identified):

1	2	3
Defts'. Ex. 79.....	Shipping tag	Rec., 1622
Defts'. Ex. 119.....	"Koke" Barrel Label	Rec., 1627
Defts'. Ex. 120.....	"Koke" Barrel Label	Rec., 1627
Defts'. Ex. 121.....	"Koke" Jug Label	Rec., 1627
Defts'. Ex. 122.....	"Koke" Bottle Label (Square).....	Rec., 1627
	"Koke" Bottle Label (Diamond shape, with "Koke" in red, on yellow back- ground)	Rec., 1627
Defts'. Ex. 123.....	"Koke" Shipping Tag for Barrels and kegs	Rec., 1627
Defts'. Ex. 124.....		Rec., 1627

Defts'. Ex. 125	"Koke" Bottle Label (Diamond shape, with word "Koke" in blue, on light blue background)	Rec., 1628
Defts'. Ex. 59	"Koke" Bottle Label (Same as Defts'. Ex. 125)	Rec., 1571
Defts'. Ex. 158	Sticker for attaching to invoices	Rec., 1632
Defts'. Ex. 165	"Dope" Bottle Label	Rec., 1633
Defts'. Ex. 181	"Koke" Bottle Label (used in Shreve- port, La.)	Rec., 1700

Defendants also stencil the word "Koke" and "Dope" on their barrels and kegs.

Of all these different kinds of labels, the only one that plaintiff has had the face to complain of as in any wise resembling any of its labels, is the blue bottle label marked *Defendants' Exhibit 125* (also shown as *Defendants' Exhibit 59*), which is said to resemble the label sometimes (but by no means generally) used on the bottles containing the aerated beverage made from plaintiff's syrup. If defendants had deliberately set out to fraudulently imitate plaintiff's labels so as to enable their goods to be passed off for plaintiff's goods, it is 'passing strange that they would have "fradulently imitated" only the bottle labels and not any of the other labels on any of the other packages. The fact that all of defendants' other labels are strikingly different from the corresponding labels used by plaintiff is a strong circumstance tending to negative an intent to fradulently imitate plaintiff's labels.

Plaintiff's rebuttal exhibits 5, 6 and 9 to the testimony of W. F. Boylin (Rec., 144-5), are catalogs, and pages from catalogs, of the American Label Works, Nashville, Tenn., showing numerous specimens of bottle labels

used generally in the trade by all soft drink bottlers. It will be observed from the specimens of labels here shown that the size, shape, color, design and wording around the periphery of plaintiff's bottle label—namely, "*Bottled under authority of,*"—are all features which are old in the art and common to the trade, and afford no indication whatever as to maker. The trade name of the product shown conspicuously in the center of the label, together with the name of the concern under whose authority it is bottles, are the only indications of origin to which an intending purchaser, exercising ordinary care to ascertain what he was getting, would be justified in looking. (See also *defendants'* (?) *exhibit* 24, the Murfreesboro "Koke" label, Rec., pp. 2007-16-20-29-30; and *defendants'* *exhibit* 30, the Houppert & Smyly "Dope" label, Rec., 1394; and *defendants'* *exhibit* 5, the "Star-Cola" label).

The particular blue bottle label about which so much has been said, does resemble the corresponding bottle label used by plaintiff in certain respects. It is about the same size and shape, and the color scheme is substantially the same. It has the same wording around the border, namely, *Bottled under authority of the,*" and the signature of "*W. McCarty Moore, Pt.,*" is printed in the place where the signature of "Asa G. Candler," P. I., "is printed on plaintiff's label. But *defendants'* label plainly states that the article to which it is attached is "Bottled under the authority of the Koke Company of Texas, Dallas, Texas," in one instance, and, in the other, that it is "Bottled under au-

thority of the Southern Koke Company, Limited, New Orleans, La." It bears the signature of "W. McCarty Moore," and not that of "Asa G. Candler," and the two signatures have no resemblance. The most prominent feature of both labels is the name of the product boldly displayed in the center. Plaintiff's bear the words "Coca-Cola" in large type, while defendants' bears the word "Koke" in type equally large and conspicuous. No one in the exercise of the slightest care to ascertain what he was getting could possibly be misled as to the source of the goods to which defendants' label was attached. He would see at a glance that it was "*Koke*" and not "*Coca-Cola*," and that it was "bottled under authority of the *Koke Company of Texas, at Dallas, Texas*," or "*under the authority of the Southern Koke Company, Limited, at New Orleans.*," and not under the authority of the "*Coca-Cola Company, Atlanta, Ga.*" There is no evidence that this label has, in fact, ever deceived anybody, and as its use has been discarded, there is no probability that it ever will. It was used only by two bottlers,—one in New Orleans and the other in Dallas, Texas,—for a period of about five or six months in 1913. Its use was wholly discontinued upon instructions from J. C. Mayfield, Sr., many months before this suit was brought, and a yellow and red label, having no similarity to plaintiff's label, was thereupon adopted and has since been used in its stead. No sort of complaint is made as to the new label.

See the testimony of J. C. Mayfield, Sr., (Rec., 1634-

4); J. A. Bernudez, (Rec., 1499); John F. Williams, (Rec., 1549); W. McCarty Moore, (Rec., 1743-8).

Plaintiff has introduced five bottles (*Plaintiff's Exhibits* 157 to 160, inclusive), having attached to them a blue "Koke" bottle label, (*Defendants' Exhibit* 125), which plaintiff's detective, Sam Friend, says he purchased at Payne's Soft Drink Stand in Dallas, Texas at 8:30 a. m., September 10th, 1914 (Rec., 849), the day before he gave his testimony in this case (Rec., 682). If these bottles were *bona fide* purchases, actually made at the time Friend says he bought them, that would not disprove the fact that the use of this label was discontinued generally pursuant to defendants' instructions. All it would prove would be that in the isolated instances thus shown, a few of them were used by defendants' bottler in Dallas, Texas, on or about September 10th, 1914, without the knowledge or consent of the defendants, and against their instructions.

It will be observed that all five of the bottles which Friend has produced have *plain* tin crowns, *without any name or decoration of any kind whatever*. The *paper labels* are the *only* things on the bottles *to indicate what they contain*. Friend also produced two other bottles (*Plaintiff's Exhibit* 154 and 155, which he says he purchased at the store of A. Conti, 2510 Elm Street, Dallas, Texas, fifteen minutes before he bought the five other bottles above referred to. These two bottles have the regular *decorated "Koke" crown*, and *no paper labels* at all. (See Exhibits referred to). This makes it plain that the Dallas bottler probably had run short of the

regular *decorated "Koke" crowns*, and that, in the emergency, as a temporary expedient, he had affixed the *paper labels* to the *bottles for which he had no decorated crowns*, in order to have *something* on them to indicate what they contained.

But, as a matter of fact, it is exceedingly doubtful whether the five bottles mentioned really represent bona fide purchases. Friend says they were purchased by him at 8:30 a. m., September 10th, 1914, (Rec., 849), the day before he gave his testimony (Rec., 682), and yet when they were unwrapped in the presence of the commissioner on September 11th, 1914, it was discovered that they were wrapped in a newspaper bearing date of May 10th, 1914. (Rec., 853). Friend says he was stopping at the Adolphus Hotel in Dallas at the time, and admits that the Adolphus does not leave old newspapers lying around in the rooms of its guests; that he did not send for any paper with which to wrap up these bottles; and that if this newspaper was in the Adolphus Hotel, it was not in his room. (Rec., 853). He finally said that H. B. Pierce, plaintiff's chief detective, furnished the paper. Pierce was also stopping at the Adolphus at the time. (Rec., 853). When Pierce later took the stand (Rec., 2074), he offered no explanation whatever as to how these bottles, alleged to have been purchased the day before, came to be wrapped in an Atlanta newspaper bearing a date four months previous. Friend admitted that "it was rather a clumsy hand" that put these labels on, and that "it looks like a botchy piece of work." (Rec., 852). He says that the labels "appear to have been put on clumsily, and the glue projects on the bottles outside

of the labels." (Rec., 852). He admits that the labels "are smeared and rumped." (Rec., 852), and then volunteers the information "that" I could not tell who put that label on, because I didn't." (Rec., 852).

These five bottles are the only ones plaintiff has produced as evidence that any of defendants' bottlers ever used the blue labels after defendants had ordered its use discontinued, although plaintiff's hordes of detectives have been for two years or more raking the country with a fine tooth comb in search of evidence that would be damaging to defendants. (Rec., 2101).

The circumstances showing how W. McCarty Moore happened to get up the blue label are fully explained by Mr. Moore, (Rec., 1743, et seq.), and entirely exonerate the defendants from any charge of fraud.

SCREDULE X.

The Crown.

1

Physical Exhibits.

Defendants' Exhibit 179 (Rec., 1642) is an envelope containing a large number of crowns that are in general use on the bottles, not only of the various brands of cola drinks, but of other kinds of soft drinks as well, such as sarsaparilla, root beer &c. Among the brands shown are, "Cola-Queen," "Arrow-Cola," "Coca-Cola," "Koke," "Celery-Cola," "Candy-Cola," "Cola," "Cola-Nip," "Rye-Ola," "Gay-Ola," "Mint-Cola," "Luck-Ola," "Peach-A-Ola," "Pure-Cola," "Sarsaparilla." These crowns are all of the same color and design as plaintiff's crown,—that is, they have the name of the product printed in red, on a silver background, with a red ring around the circumference of the crown. This is perhaps the most generally used design of crown on the market. The crown manufacturers turn out these crowns by the millions, and sell them to every one who does not specify any particular design. Crowns of this same design, used on other cola products, will be found on the bottles filed as *Defendants' Exhibit 1, 2, 3, 4, 6, 43 to 54, inclusive, 189 to 213, inclusive, and 215 to 223, inclusive,* and on Plaintiff's Rebuttal Exhibits 68 to 77, inclusive.

There is not a word of testimony in the record to the effect that the color and design of plaintiff's crown is,

to any extent whatever, different from the color and design of crowns used generally in the trade, or that it affords the slightest indication, either to the general public or to any one else, as to the origin or manufacture of the goods.

2

Admissions of Plaintiff's Witnesses.

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn., who formerly bottled a drink similar to "Coca-Cola" in bottles having thereon crowns (For specimen, see Plaintiff's Rebuttal Exhibit 101-2) exactly like the "Koke" crowns used on defendants' bottles. (Rec., 20-26-7):

"You asked why we had our 'Koke' crowns—those marked *Plaintiff's Rebuttal exhibits 101 and 102*,—printed in that color, and on that silver background; why, just showy, I suppose, is why. We had *other crowns like that*, red, on a silver background, with a red circle around them. * * *

"Q. Did you think anybody would mistake that crown for a 'Coca-Cola' crown? A. Not the *reading* of the crown.

"Q. Well, do you think the *general appearance* of the crown—anybody would mistake it? A. The only resemblance between that and the 'Coca-Cola' crown is a little flourish on the lettering.

"Q. And you think anybody could tell that right off? A. I think they could."

S. B. CHRISTY, the partner of J. W. Huggins (Rec., 20-29-30):

"I would not be able to tell you when we began to use the crown marked *Plaintiff's Rebuttal Exhibit No. 101*,—probably 1905. * * * At that time * * * *a good many of them had crowns like those*—I mean red, on a silver back ground. I suppose crowns like that, the red letters on a silver back ground, with a red ring around them, were *in general use* at that time [in 1905]. There was no objection to our using them at that time."

H. B. PIERCE, plaintiff's chief detective (Rec., 2137):

"Q. Does the name 'Dope,' as it appears on the caps of defendants' bottles, look like the name 'Coca-Cola'!? A. Only the script or style of letters used. * * *

"Q. Do you think you would mistake that name for the name 'Coca-Cola' on the crown of the bottle? A. Not I, I would not.

"Q. Do you think anybody would? A. They may, I do not know.

"Q. Do you think any rational being, anybody with common sense would? A. I do not know.

"(Mr. Hirsch: I object to that. He don't know what a rational being with common sense would do).

"Q. Would you mistake the [word] 'Koke' written in [script on the] caps *on* [of] defendants' bottles, for the name 'Coca-Cola'? A. No."

G. H. WILKINS, the detective in the employ of Edward S. Rogers, Esq., Chicago (Rec., 883-7):

"When I bought these bottles I knew all the time by looking at the bottles that they were not 'Coca-Cola,'—yes, sir, when I saw the bottle I did. **Rec.,**

883). * * * When I saw the bottle I knew it was not 'Coca-Cola.' (Rec., 884). * * * You ask if I did not know that these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case were wrapped up. Of course, I could not tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew they were not 'Coca-Cola.' (Rec., 886). * * * If he hands it across, I would know that it was not Coca-Cola.' You ask if I would know that *as soon as I saw the crown*; to the best of my knowledge it would *not* be 'Coca-Cola' with a 'Koke' crown. * * * No, I did not mean to tell you that that looks anything like 'Coca-Cola' to me, now, because I have handled too many of them. I do not believe it did look to me like 'Coca-Cola' the first time I saw it." (Rec., 886-887).

SCHEDULE XI.

THE MARKS "DOPE" AND "KOKE" DO NOT DECEPTIVELY RESEMBLE THE MARK "COCA-COLA."

Coca-Cola Co. vs. Branham, 216 Fed. 264;
Coca-Cola Co. vs. Koke Co. of America, *Certified Copies of Certain Opinions and Decrees*, page 14; *Appelle's Brief*, Appendix 4, page 164).

Admissions of Plaintiff's Witnesses.

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn., who formerly bottled a product which he labeled "Koke" in the identical style of type as that used by defendants:

"Q. Mr. Huggins, did you consider that your trade-mark 'Koke' so nearly resembled the trade-mark 'Coca-Cola' as to be likely to cause confusion in trade, or to deceive purchasers? A. I do not think that there was but very little resemblance in the forming of the two words,—in the formation of the two names.

"Q. Well, did you think there was *any* resemblance between them, in *sound, appearance* or *suggestion*? A. No, sir; not between 'Coca-Cola and 'Koke.'

"Q. You consider them *entirely different words*? A. *I consider them entirely different words.*

"Q. Not only in the *appearance*, but in the *sound* of them? A. Yes, sir.

"Q. And in their *significance*? A. *Yes, sir.*"
(Rec., 2019-2020).

S. B. CHRISTY, the partner of J. W. Huggins in the "Coca-Cola" bottling business at Murfreesboro, Tenn., and who was formerly the partner of Huggins when he bottled the product "Koke":

"Q. Did you think you had a right to put this name 'Koke' on there? A. The Government thought so.

"Q. Didn't you know this name 'Koke,'—anybody looking at it would right off think it was 'Coca-Cola'? A. *No, sir.*" * * *

"Q. Didn't you know that the appearance of that word, 'Koke,' as it is written on that label marked *Defendants' Exhibit No. 24*, looks so much like 'Coca-Cola' that you cannot tell the difference? A. *No.*

"Q. You mean to say it looks *different* from 'Coca-Cola'? A. *Yes.*

"Q. You mean to say that *any body can tell the difference right off*? A. *Anybody that cold read, they could.*

"Q. But, as a matter of fact, however, it *sounds* just like the four syllable name 'Coca-Cola, don't it? A. *No.*

"Q. Do you think *anybody could tell the difference in sound* between the word 'Koke' and the word 'Coca-Cola'? A. *Yes.* Rec., 2030-2031) * * * Q. Don't you know, Mr. Christy, that you adopted that name 'Koke' for the sole and only purpose of enabling you to substitute your beverage for 'Coca-

Cola,' and pass it off to the public and fool them and make them think it was 'Coca-Cola'? A. No, we did not try to fool them that it was 'Coca-Cola,' because *they knew it was not 'Coca-Cola.'* Q. *How did they know that it was not 'Coca-Cola'?* A. We advertised it as 'Koke." (Rec., 2032-2033).

H. B. PIERCE, the chief detective for the Coca-Cola Co. in charge of working up the facts in this case:

"Q. Does the name 'Dope,' as it appears on the caps of the defendants' bottles, look like the name 'Coca-Cola'? A. *Only the script or style of letter used.* * * * Q. Do you think you would mistake *that* for the name 'Coca-Cola' on the crown of the bottle? A. Not I, *I would not.* Q. Do you think *anybody would?* A. They may; I do not know. Q. Do you think *any rational being, anybody with common sense* would? A. I do not know. (Mr. Hirsch: I object to that. *He don't know what a rational being with common sense would do*). Q. Would you mistake the [word] 'Koke' written in [script on the] caps on defendants' bottles for the name 'Coca-Cola'? A. No." (Rec., 2137).

GEORGE H. WILKINS, the private detective in the employ of Messrs Read & Rodgers, attorneys for the Coca-Cola Company, Chicago:

"I purchased these green flint bottles, Exhibits Nos. 180, 181 and 182, in New Orleans. I took these bottles out with me after buying them because I wanted evidence that they were substituting and selling 'Koke.' When I bought these bottles I knew all the time by looking at the bottles, that they were

not 'Coca-Cola.' Yes, sir, when I saw the bottle I did. And in the case of the Comus, I did not see the bottle. The man wrapped it in a newspaper and handed it to me. No, I would not know whether it was a bottle of 'Koke' or Ginger-Beer if it was wrapped in a newspaper. When I saw the bottle I knew that it was not 'Coca-Cola.' In the places where I did see the bottle before purchasing same, or at the time of my purchase, I knew that it was not 'Coca-Cola' I was purchasing, that was why I wanted the bottle. (Rec., 883-884) * * * You ask if I did not know that these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case they were wrapped up. Of course I could not tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew they were not 'Coca-Cola.' * * * You say that of course if he covers it one could not tell if it was a bottle or not; you mean if I looked at it; if he handed it across I would know that it was not 'Coca-Cola.' You ask if I know that as soon as I saw the crown; to the best of my knowledge it would not be 'Coca-Cola' with a 'Koke' crown. * * * No, I do not mean to tell you that that looks anything like 'Coca-Cola' now, because I have handled too many of them. I do not believe it did look like 'Coca-Cola' to me the first time I saw it. (Rec., 886-887).

FREDERICK CONWAY PEACE, an ex-Pinkerton detective in the employ of the Coca-Cola Company to work up the facts in this case:

"You ask if I have seen the bottled 'Koke' or 'Dope' put out by bottlers; yes, sir, but not in Dallas, I saw them down in Mississippi. Yes, sir; the crown was on them. Yes, sir; I have also seen the bottled

goods sold at various places with the name 'Dope' on the crown—it would not be anywhere else on the bottle. It was not blown in the glass, and *when the crown was pulled off* and the consumer had got the bottle, *he could not tell what was in the bottle; it would not be labeled then.* (Rec., 2216).

GEORGE J. MARTIN, a traveling salesman for the Coca-Cola Company:

"Yes, I have drank 'Koke.' Q. You could tell right off it was not 'Coca-Cola,' couldn't you? A. Well, of course, I got it out of a 'Koke' bottle * * * If he had given it to me *and I had not seen the label on it*, I don't know what I would have thought." (Rec. 345).

E. R. ALBRIGHT, a member of the firm of Albright & Wood, which operates two drug stores in Mobile, Alabama:

"I wanted the stuff ['Koke'] shipped *without the labels*, because I did not care for my customers to know that I was using the stuff at all; if they knew it, they might use it in an unfair way and say I was using it instead of 'Coca-Cola.' (Rec., 548).

DAVE S. BAUER, a retail druggist, Mobile Ala.:

"I had given instructions to my soda dispensers to make inquiry of purchasers who asked for 'dope' and 'coke' if they wanted 'Coca-Cola.' When they say 'Give me just what we ask for,' we say, 'Well, we do not carry anything but Coca-Cola.' In a good many instances they said 'Look here, I did not

come in here to be jollied. I came in here to get what I want.' The dispensers would then say, 'We just don't serve anything else but 'Coca-Cola,' and this card would be shown to the purchaser, and in a majority of cases the fellows would just tell what they wanted. The card referred to is the one marked *plaintiff's exhibit* 100. Of course I watched this pretty close to see what effect it would have on my business, and visited my soda fountain more often than usual, and whenever I seen that card shown them, without one exception I heard the reply, 'Say, I want Coca-Cola.' I did not know there was *two* drinks. I did not know there was *another one like that*." (Rec., 537).

JOHN CAIN, a hired spotter for the Coca-Cola Company:

"The way I know they handled it ['Koke'] is because Mr. Rausch told me that he handled it. He told me that that day I went down there. He has got a bottle down there that you can see it—it is a syrup bottle, a bottle of syrup. It is syrup down there—'K-O-K-E'—*as big as life*.".....(Rec., 626).

D. P. ENGLISH, a retail druggist, Dallas, Texas:

"They got this product 'Koke' to which I refer from the Koke Company in Dallas, Texas, in barrels colored red. There was very little difference between their barrels and the Coca-Cola barrels—you know not notice it without examining the 'Koke' and *saw* [seeing] *if the 'Koke' label was on the end*." (Rec., 802).

CLARENCE J. HOGAN, a Pinkerton detective employed by the Coca-Cola Company as a spotter :

"We have produced all the 'Koke' that was offered us for 'Coca-Cola.' You say you take it for granted that we were not deceived when we got it; why, sure not. WE were out hunting for it and when we got it we simply picked it up and took it out. Sure we knew what it was when we got it." (Rec., 649-650).

FRANK J. BOGNER, another Pinkerton detective employed by the Coca-Cola Company as a spotter :

"Yes, sir, we produced all the 'Koke' we got in our search. We were employed to get that stuff if we could; we went out to see if they would sell us 'Koke' for 'Coca-Cola,' and when we got it we wrapped it up and put the name of the party we got it from on it. We went to see if we would get a substitute for 'Coca-Cola' or not, and when we got it we got what we were searching for, got the evidence against him. Of course, when those fellows gave us a bottle wrapped up we knew we had them." (Rec., 653).

B. J. GILLION, still another Pinkerton detective employed by the Coca-Cola Co. as a spotter :

"In each place we went to we called first for a glass of 'Coca-Cola,' and they served us out of the bottle—they poured it out of the bottle into a glass, we drank from the glass * * * When we drank the drink we asked for a bottle of that drink under some circumstances and under other circumstances we did not ask for it. In each instance I saw the drink

which was served us in the bottle in which it was served, and in those cases where we got a drink in a glass, I knew what the bottle contained before I drank the stuff, so I was not deceived at any time by what I drank. In each instance where I ordered the drink and got it in a glass and followed it up by an order of a bottle, in each such instance I saw that it was a bottle of 'Koke' that had been served me in a glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, I was satisfied it was 'Coca-Cola'. (Rec., 661).

In *Coca-Cola Company vs. Branham, et al*, the record in which case was filed without objection as Defendants' Exhibit 272 in this case, Walter Duckett, a witness for the Coca-Cola Company, in relating the circumstance that a bottle of 'Koke' was handed to him by a certain retail dealer in soft drinks in response to his request for 'Coca-Cola,' said: "I went into Mr. Sexton's store and asked for a bottle of 'Coca-Cola,' and they gave me a bottle of what looked to be 'Coca-Cola,' but I noticed on the label it was labeled 'Koke.'" (*Branham Rec.*, 46).

And again, in explaining how he discovered it was "Koke" and not "Coca-Cola," he said:

"I saw the 'Koke' label on the bottle, that is the way I noticed it." (*Branham Rec.*, 47).

E. D. SEXTON, a witness for the Coca-Cola Company, said:

"The 'Koke' that I speak of * * * was labeled on top something similar to the 'Coca-Cola,—the same kind of surroundings on it, but of course, it did not have the same printing on it." (*Branham Rec.*, 47).

F. S. WOODRUFF, a witness for the Coca-Cola Company explains that he rescued the cap of a 'Koke' bottle that had been served to him in response to his request for 'Coca-Cola,' and thereby discovered that it was 'Koke' and not 'Coca-Cola' that had been handed to him. He said:

"We broke the balls and commenced to play, and he came back with two bottles like that (indicating) and started the cap of one bottle for Mr. Duckett, and I walked over and took a key from my pocket and uncapped mine and put the cap in my pocket. The cap was printed 'Koke.' " (Branham Rec., 50).

GEORGE VANCE, a witness for the Coca-Cola Company was asked if he believed that the bottled beverage offered to him at the fair grounds in response to his request for "Coca-Cola" was "Coca-Cola," and he said:

"No, sir, I would not testify to believing that I bought a Coca-Cola bottle by the bottle, or by the label, or by the general appearance of the bottle and the label." (Branham Rec., 52).

T. A. PENNY, a witness for the Coca-Cola Company swore:

"I examined the stopper of the bottle marked Exhibit "A," and state that *the characters used in the word 'Koke' are not the same that are used in Coca-Cola.*" (Branham Rec., p. 38).

SCHEDULE XII.

The Slang Expressions, "Coke," "Dope," Etc.

The slang expressions "coke," "dope," "shot in the arm," &c., as used by the public in asking for soft drinks, have not and could not have acquired a secondary meaning, indicating origin and distinguishing the character of drink which the words appropriately describe, when made by plaintiff, from the same kind of drink when made by others, because the words have no reference whatever to maker, but refer solely to the ingredients and characteristics of the article itself.

1

Testimony of Defendants' Witnesses.

MAX BLOOMSTEIN, a retail druggist for 30 years, Nashville, Tenn. (Rec., 1145-7).

"We handle 'Coca-Cola,' and Diehl & Lord's 'Star-Cola,' and 'Koke' and 'Dope.' I am about the fountain frequently, and can hear the words our customers use in asking for the different drinks they want. * * * The words 'coke' and 'dope' are used very largely, generally signifying that they want any stimulating drink that has caffeine in it. * * * Generally it means just any of them. Any drink with caffeine,—any stimulating drink—is called for by the name of 'coke' or 'dope.' When a customer comes in to our soda fountain and asks for a 'coke' or a 'dope,' right now he is served with

the 'Koke' or 'Dope' preparation made in Chattanooga. Before that was put on the market he was usually served with 'Star-Cola,' made by Diehl & Lord. When a customer comes in and asks for a 'coke' or a 'dope' and is served with Diehl & Lord's 'Star-Cola,' I surely consider that I am giving him what he asked for. I have heard these words 'coke' and 'dope' from five to ten years, I cannot state exactly. The words 'coke' and 'dope' mean to me any drink having caffeine or stimulant in them. I regard these names 'coke' and 'dope' as nicknames designating a class of drinks, rather than a specific drink. I cannot say just exactly where that slang 'coke' and 'dope' originated. I presume it originated because it just had the same effect. I have heard the word 'dope,' as applied to cocaine, to morphine, and heroin, before I ever heard it applied to the drink, quite a number of years ago. I have no way exactly of knowing how long. I have heard it applied to the drinks, but 'dope' seems to me to be something that stimulates, or makes you feel a little better, or a little different, from what you ordinarily did. It was originally applied to morphine and cocaine, because it temporarily rejuvenated a man, and I think it was applied to 'Coca-Cola' just after having been applied to the cocaine and morphine drugs, that is my idea. I have known, ever since I have known drinks, just what was in them. I do not know whether the ordinary layman who drinks them knows what is in them, but I have always known why they stimulate, and why they have that effect. There is caffeine in them. Caffeine is referred to by the public frequently as a 'dope.' "

JOHN R. PARDUE, soda dispenser, Nashville,
Tenn. :

“Some of the cola drinks we have are ‘Koke,’ ‘Dope,’ and ‘Coca-Cola.’ Others I have dispensed since I have been dispensing soda water are ‘Star-Cola,’ ‘Fletcher’s Cola,’—I believe those are about the only ones. I have been dispensing soda water about ten years, I think. * * * Some customers called for ‘Coca-Cola,’ some for ‘dope’ and some for ‘coke.’ We have had a few calls for ‘shot-in-the-arm.’ * * * When they ask for ‘coke’ or ‘dope’ they want something of that class,—a cola drink. When a customer comes in and asks for a ‘coke’ or a ‘dope,’ I do not understand that he is making a specific or definite request on me for ‘Coca-Cola’ exclusively. I frequently go into soda fountains myself and ask for cola drinks. I ask for them as ‘coke’ or ‘dope’; it makes no difference to me as I get a cola drink. (Rec., 1133-4) * * * ‘Coke’ and ‘dope’ is just a nickname applied to cola drinks. I suppose it arose something on the cocaine idea,—about cocaine being in the drinks,—in ‘Fletcher’s Cola,’ ‘Coca-Cola,’ and several other drinks. * * * I have heard that it was in all cola drinks; customers have said so at the fountain,—that there was cocaine in cola drinks, ‘Koke,’ and ‘Dope,’ or ‘Coca-Cola.’ I first heard the expressions ‘coke’ and ‘dope’ some ten or twelve years ago, I think. * * * The reason the nicknames arose was on account of the discussion as to the cocaine, that is my idea. * * * I have heard of cocaine in regard to ‘Coca-Cola’ and ‘Fletcher’s Cola’ and all of them. (Rec., 1138-9). * * * They just said all Coca-Cola and dopes all had dope in it, and I heard that about ten years ago, and we have discussed that ever since. (Rec., 1140). * * * I do not know how these names ‘coke’ and ‘dope’ originated, except the discussions about cocaine.

* * * We have more calls for just 'root beer' than for 'Hires root beer.' Like you go up to a bar and call for a beer, there don't every one go up to a bar and say give me a certain kind of beer, they just say they want a glass of beer. When people ask for 'coke' and 'dope,' they want a cola drink,—a stimulating drink. * * * Customers tell me it is all dope, is all I know about it,—and a dope will make you feel good, it will liven you up, it comes from stimulation. A 'dope-fiend' is a fellow that takes 'dope,'—it is something that livens you up, makes you feel good,—it is a drug." (Rec. 1143-4).

A. S. JOSEPH, proprietor Woodward Bar, Birmingham, Ala.:

"During the time I have been at that bar I have dispensed all the different colas,—too numerous for me to remember the different names. Some of them are 'Chero-Cola,' 'Coca-Cola,' 'Nifti-Cola,' 'Gay-Ola,' and others. I do not know how many of these cola drinks are on the market here in Birmingham,—possibly 8 or 10. (Rec., 1331). * * * In asking for these different cola drinks some customers specify what they want, and others do not. I hear the word 'dope' used very frequently. When they ask for a 'dope' I get them the first thing I put my hands on in the soft drink line. I am about the bar mwself six to eight hours a day. * * * I hear the customers' ask for drinks they want. When a customer comes in and asks for a 'dope,' I do not consider that he has made a specific and definite request on me for 'Coca-Cola.' The general impression is that all these soft drinks *along that line*, whether designated by one name or the other, is all

on the 'dope' order,—'coke' order; some call it 'dope' and some call it 'coke.' 'Dope' means to me ordinarily a narcotic. I have an idea why they call these drinks 'dope.' I think that the advertising that the public has got out of the newspapers at various times when these suits were brought kind of educated them along the lines of what they contain, or at least gave the impression that all these 'dope' drinks contained some kind of 'dope' or 'coke' on the order of a narcotic, and they would come in and say, 'give me a "dope," ' or 'a "coke,"' under the impression that they are going to get some percentage of narcotic. * * * The general discussion among the consumers of these colas is that all cola drinks contain some percentage of narcotic. * * * It has been created in the mind of these people that it is the game to play, that there is a slight percentage of narcotic in these drinks, and they cannot go up against morphine or cocaine, so they play the other. * * * The impression has been created, and still exists, that all cola beverages contain a percentage of narcotic. * * * (Rec., 1332-3). * * * When a man comes into my place of business and asks for a 'dope' or a 'coke' I give any soft drink; it does not make any difference, just the one I put my hand on. I do not consider 'dope' and 'coke' names for lemon soda, strawberry soda, or anything; that is *soda water*, and they have an entirely different purpose. That [the cola drink] comes under a head of entirely different beverage from sarsaparilla and lemon soda. What we give them when they ask for 'coke' or 'dope' depends upon what brand of goods we handle; we might have three or four different brands, such as 'Chero-Cola,' 'Coca-

Cola,' 'Nifty-Cola.' * * * That impression arose with regard to the impression about 'Koke,'—'K-o-k-e'—that it had this narcotic in it, because, when they speak of morphine or cocaine, they designate it as 'coke.' 'Coke' would designate cocaine or morphine, and the impression is that 'Koke' has cocaine or morphine in it." (Rec., 1334).

JOHN D. FLETCHER, manufacturer of "Fletcher's Cola," Nashville, Tenn. (Rec., 1091):

"Customers ask for my product at the soda fountain as 'cola,' 'coke' and 'dope.' I have heard these words 'coke' and 'dope,'—I do not know that I could say that I have paid any very great attention to it, only in the past few years, probably. I do not know that I have paid particular attention to it,—since the last four or five or six or seven years, probably. It may have been longer than that, but I do not know. The word 'dope' means to me that they want a caffeine drink. * * * The word 'coke' means the same thing. If a man asked me to take a 'dope' with him, I would naturally think it was a caffeine drink, whether it was 'Coca-Cola,' 'Gay-Ola,' 'Rye-Ola,' my own drink, or some one else's. I do not think the public would care what it was, whether one or the other, so they got a drink that satisfied their palate, and was strong enough in caffeine to feel it, you might say."

F. C. DORIDER, for 27 years in the confectionery and soda business, Nashville, Tenn. (Rec., 1195-7):

"I have heard customers come in and ask for 'coke,' or 'dope.' Well, if we had a customer that was drinking 'Coca-Cola,' we naturally gave him

'Coca-Cola' when he called for 'dope.' We had 'Celery-Cola,'—and when they called for 'dope' and we knew they had been in the habit of drinking that, we gave them 'Celery-Cola.' We gave them 'Celery-Cola' or 'Cola-Ade,' as a great many of them were in the habit of calling for 'dope' like they do right now. * * * My impression is I first began to buy that 'Celery-Cola' from him [J. C. Mayfield] 12 or 15 years ago, I cannot recall exactly. We handled different kinds of cola,—'Cola-Ade,' 'Celery-Cola,' 'Coca-Cola,' and a good many of those colas, I cannot recall them. * * * I was about the soda fountain frequently myself so I would hear the names people used in asking for the drinks. * * * I never heard of any kicks. Of course, the boy at the fountain is supposed to know what he is giving out to them; if they called for a 'dope' and he did not know what they wanted, he would ask. If any one came in and asked for 'dope,' I would ask him what he wanted. Some of the names they called for were 'Cola-Ade,'—we sold a great deal of 'Cola-Ade,'—we sold a great deal of Cola-Ade' for a while,—'Celery-Cola,' 'Coca-Cola,' whatever cola we had. We had customers come in and ask for a 'dope,' and when I asked him what he wanted, he would reply that he wanted a 'Cola-Ade,'—every day they done that. 'Celery-Cola' is what the most of them said they wanted. (Rec., 1195-6). * * * When a customer would come in and ask for a 'dope' or a 'coke,' I do not consider that he had made a definite and specific request on me for 'Coca-Cola' alone,—not unless we knew he was drinking it; I mean a regular 'Coca-Cola' drinker that I knew wanted 'Coca-Cola.' The word 'dope' means,—well, I suppose the cola people are suppose to give people the impression that they put cocaine in it, and I think the word

'dope' came from that; I don't know whether the rest of them did or not, but I always thought they did. The word 'dope,' as applied to soda fountain drinks means no particular drink. We consider it applies to these different drinks, like 'Cola-Ade,'—anything with the name cola to it. I think they have been serving 'Star-Cola' the last year or two at the ball park. Most everybody calls it 'dope,'—'Give me a "dope," boy,'—I suppose they know what they are getting; I think there is something on the bottle to indicate what it is,—I never noticed the bottle carefully. I hear lots of the boys dispensing 'Star-Cola,' calling 'dope,'—some say 'Star-Cola' and some say 'dope,' and different kinds of things. These words 'dope' and 'coke' are used in the trade to designate cola drinks as a class. I heard these words 'coke' and 'dope' fifteen or eighteen years ago, I reckon. I think during that time they have had the same meaning that they have now. If a customer fifteen or eighteen years ago would come into our soda fountain and ask for a 'dope,' if we did not know what he wanted, we would ask him what he wanted; we consider to or three of them 'dopes.' " (Rec., 1196-97).

C. P. EMBREY, a retail druggist, Chattanooga, Tenn. (Rec., 1019-21):

"I dispense soft drinks at my soda fountain. I dispense cola drinks there. I dispense 'Coca-Cola,' and one named 'Ko-Nut.' * * * There are so many, nearly everybody who opens his grip when he comes in has a cola syrup to sell, and, naturally, you would not remember all that comes around; there is a great many cola drinks on the market. (Rec., 1019).

* * * When customers call for 'dope' we give them the one we make the most money on. I do not regard the word 'dope' as a specific and definite request for 'Coca-Cola,' exclusively; I regard it as a nickname for that class of drink. I have heard the word 'dope,' I will say, ten years, but during all that time it had the same meaning to me that I have just stated. 'Dope' at a soda fountain means a drink that exhilarates, like [a] caffeine drink, and 'dope' at a prescription counter means some narcotic used in an abnormal way, or used in excess,—that is the way I look at it. The way I look at it, it has been in litigation that 'Coca-Cola,' or any of those dope products, are injurious to you, you see, and then people just got the idea that the drinking in excess would injure,—that is the way the public would think, whether it was true or not. * * * We do not handle 'Hires root beer'; we have not for years. * * * I have had calls for 'Hires root beer," and told them that we did not handle that, but handled Smith's root beer. The customers would be satisfied. They wanted a drink of that main general description. The same situation applies to the cola drinks." (Rec., 1020-1021).

F. M. BOGART, prescription clerk and soda dispenser, Chattanooga, Tenn.: (Rec., 1070-1):

"I am about the fountain frequently and can hear calls people make for the different drinks they want. We serve 'Coca-Cola,' 'Ko-Nut,' 'Afri-Cola' and 'Mays-Ola.' * * * In making known to me the different cola drinks they want, some say, 'Give me a dope,' 'a shot-in-the-arm,' 'shoot me.' I understand when they ask for those names they want some stimulating drink. I do not understand that

they have made a definite and specific request for 'Coca-Cola' exclusively. I do not think these nick-names specify any certain brand of drink. We give them, when they call for these different names, just what we happen to have, 'My-Ola,' 'Mays-Ola.' * * * I have never had any of these cola drinks, other than 'Coca-Cola,' rejected by a customer on the ground that it was not what he asked for, when served in response to a request for 'a dope,' or 'a shot,' or 'shoot me,' or any thing of that kind. * * * When people call for 'dope,' 'shoot me,' or 'shot-in-the-arm,' I just imagine they want something to stimulate them,—dope."

E. A. SHARP, proprietor of the Terminal Pharmacy, Jacksonville, Fla. (Rec., 1250-5):

"We dispense ice-cream sodas, root beer, 'Coca-Cola,' 'Dope,' 'Brain-Oil,' 'Gay-Ola,'—you know about the line of stuff. We handled all those. We do not dispense 'Gay-Ola' right at the present time. * * * When a customer comes into our soda fountain and asks for a 'dope' or a 'coke,' I do not consider that he had made a definite and specific request on me to serve him 'Coca-Cola' only. (Rec., 1250). 'Dope' and 'Koke' are similar to 'Coca-Cola,' because both contain about the same constituents,—caffeine. That is the reason people call it 'dope,'—because it is a cola drink with caffeine. Before we handled 'Koke' and 'Dope' we used to handle a cola, and perhaps when a man wanted a 'dope' or a 'coke,' we gave him 'Brain-Oil,' or 'Coca-Cola,'—anything we wanted. * * * If a man asks for 'Coca-Cola' he wants 'Coca-Cola,' and if he asks for a 'dope' he means most anything *in that line*. (Rec., 1253 * * * When a man came in and asked

for a 'dope' or a 'coke,' we took it for granted he meant a cola drink; that that was a dope. (Rec., 1254). * * * I never thought 'coke' and 'dope' were nicknames for 'Coca-Cola,'—not necessarily. My estimation of the term is that it is a cola drink." (Rec., 1255).

R. K. SMITH, head dispenser of the United Cigar Stores, Nashville, Tenn. (Rec., 1187-1191):

"We handle 'Coca-Cola,' that is the only one. We have people come into our fountain and ask for 'coke and 'dope.' If it should be a regular customer that I have been in the habit of serving at all times and know what he drinks, I give him 'Coca-Cola,' if that is what he drinks; otherwise, if he asks for 'coke' or 'dope,' I ask if he wants 'Coca-Cola.' * * * I think that 'dope' would mean any kind of stimulating drink, or caffeine, or such as that,—headache medicine,—or 'Coca-Cola,' as a lot of people call that meaning 'Coca-Cola' when they say 'dope.' I have known of 'Fletcher's Cola' and 'Dope'; they are about the only two colas that I have seen. I have heard of more than that, I suppose, but not very much. If a customer came in and ask for a 'coke' or a 'dope,'—I do not know anything he likes, and he has not been a regular customer,—why, I would give him the one I made the most on. If I had a 'dope,' and he asked for 'dope,' I would be giving him what he is asking for. 'Dope,' in my opinion, does not exactly specify 'Coca-Cola.' I have people come in and ask for 'dope' when they want 'Capudine,' or any headache medicine,—for instance, 'Bromo-Seltzer. (Rec., 1187). * * * I do not know whether or not among our trade the fact that there are other cola syrups on the market

and dispensed at the soda fountains in Nashville, is well known. There is no doubt but that it is known among some people. We have regular trade and transient trade, also; more of a regular trade than what you would call transient. When they call there, as a rule, we know what they want. * * * I have not sold anything except the straight 'Coca-Cola.' I have no other drinks similar to that one, and, as I said a while ago, people come in and ask for a 'dope' and a great many times they mean a headache beverage, something like that,—a caffeine drink, or something stimulating. * * * I have gone into a near beer stand or saloon and got a glass of beer; I have asked for it as 'a glass of foam,' a 'scuttle of suds,' or something of that sort. I expected to get whatever they were serving when I asked for the glass." (Rec., 1191).

T. H. LEVER, manager K. W. N. Pharmacy, Spartanburg, S. C. (Rec., 1228-31):

"I dispense at my soda fountain a general line of drinks. I handle the 'Dope' and 'Koke' and Coca-Cola.' I know a number of others, 'My-Cola,' 'Ko-Nut,' 'Rye-Ola,' 'Gibb's Cola,'—that is a new one, just became acquainted with yesterday. I have known of cola drinks ever since I have been in the drug business,—about eight years. * * * As a rule my customers come in and call for the drink they want, sometimes, and then at others they will come in and say, 'Give me a drink'; sometimes they will say, 'Give me my dope,' and any kind of—making sort of an application for a drink without designating just what they want. (Rec., 1228). * * * I have had them come in and point at the bottle of 'Capudine' and say, 'Give me my dope,' or I have

had them point at 'Bromo-Seltzer,' 'Celery-Caffeine' or any of those headache salts, when they kind of establish themselves with a certain drink at the fountain, and in a good many instances when they come in they do not call it by its proper name, but, 'Give me a dose of my dope.' (Rec., 1229). * * * I had some 'Ko-Nut' on hand at one time, but that was before your drink 'Koke' and 'Dope' came out. Customers in asking for that drink 'Ko-Nut' called for 'dope' and I gave them 'Ko-Nut.. At the time I handled other cola drinks, I understood customers wanted a coca drink when they came in and asked for a 'dope.' I did not consider that it designated any particular cola drink, and very often I would ask them to designate the kind of drink they wanted. (Rec., 1229-30). * * * When a customer came into my store and asked me for a 'dope' I did not consider that he had made a definite and specific request on me to serve him with 'Coca-Cola' and nothing else." (Rec., 1231).

DR. J. G. PYLE, a retail druggist, Dallas, Texas, (Rec., 176):

"I do not remember when the name 'coke' got to be used. You hear it oftener the last few years than you used to. (Rec., 1725). * * * There used to be a lot of talk about cocaine in 'Coca-Cola,' and people used to ask if it had cocaine in it, and that stuff."

ADAM DIEHL, manufacturer of "Star-Cola," Nashville, Tenn. (Rec., 1082-7):

"We manufacture a cola drink, 'Star-Cola.' We have been putting out that drink about fifteen years. We make syrup for the making of the drink. We

sell it to soda fountains and bottlers,—advertised around town and all over the United States, in the Bottler's Gazette, and that is supposed to go to every bottler in the United States. Around in Nashville we have advertised it on bill boards, daily papers, programs, these slides in picture shows. 'Star-Cola' is sold at the baseball park exclusively. We have a large sign right opposite the grand stand, which shows *'Diehl & Lord's Star-Cola and Pepsin sold exclusively on these grounds.'* We have ten or fifteen boys taking it through the audience, and they have it on their buckets, and printed across the face of their caps, and then the boys are all instructed,—and which they do,—when they go selling it [to call out] 'Diehl & Lord's ice-cold "Star-Cola" and "Pepsin" and "Digestol,"'—the three drinks we sell there. We advertise also on the program. We advertise our drinks as sold exclusively at the ball park; we make that our specialty in the advertising. Customers say, 'Give me a dope,' 'two dopes,' 'a Pepsin Nut,' or 'Digestol,' if there is four, —some call for 'Star-Cola' and some say 'Give me a bottle of cola.' When they ask for 'dope,' 'Star-Cola' is served. They know, when they ask for 'dope' and are served 'Star-Cola,' that it is not Coca-Cola,' by the boys calling 'Diehl & Lord's Star Cola,' by the advertising on the sign, too, and by the advertisement I have put on the program that 'Star-Coa' is sold exclusively on the grounds. On the bottle is 'Diehl & Lord's Star-Cola.' The crown has also 'Star-Cola' on it. The label is blown in the glass. When a customer asks for a 'dope,' I understand that he wants any cola drink. I do not regard the name 'dope' as a specific and definite name for 'Coca-Cola' exclusively. I would take it from experience,—my experience has been,—when they

call for 'dope' they want ours, or whatever we have got; when they want a cold drink, they will say give me a 'dope' or 'coke,'—some nickname of that kind. If a customer came into my place of business and asked for a 'dope,' I would understand he wanted a box of cola drinks. There are forty or fifty other cola drinks on the market today that I know of, I could not mention them all. I have known of cola drinks on the market, I suppose, twenty-five years. (Rec., 1082-3-4). * * * When I talk about 'dope,' or 'coke,' either, it usually refers to a cola drink with me. It does not mean any special one. When I saw 'Koke' or 'Dope,' it would mean with me, as a bottler, if I was going to bottle the stuff and wanted call for 'Koke Syrup; but the general public, when they are at the parks, for instance, they would call for 'dope,' that would mean they want a bottle of cola. I have heard them call it 'coke' and 'dope.' That is what they mean down there,—we only sell three drinks, and, when they call for 'coke' or 'dope,' the boy knows he means a cola drink." (Rec., 1086-7).

W. F. BOYLIN, president of the American Label Words, Nashville, Tenn. (Rec., 1074-5):

"When I go into a soda fountain, or place where they sell bottled cola drinks, or soft drinks in bottles, and ask for a 'dope,' I expect to get a cola drink. If I want 'Celery-Cola,' I know I have got to ask for Celery-Cola. * * * If I go in and ask for 'a coke,' I expect to get any cola drink. I do not regard the names 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. I have heard these words 'coke' and 'dope' for ten, or twelve, or fourteen, years anyway,—fifteen years, I should

say. I regard them as nicknames for cola drinks as a class. * * * Out to the base ball park here in the summer time there is no cola drinks sold there except Diehl & Lord's 'Star-Cola.' That is sold in bottles. I have heard them ask for it as 'coke' and 'dope.' * * * They always have signs out there, and have crowns on the bottles the boys bring out in the stand, with the name on it. When people ask for 'dope' or 'coke' and are served with 'Star-Cola,' I think they know they are getting 'Star-Cola.' I have heard it asked for as 'coke' or 'dope,'—nearly always in calling for a drink out there, I say, 'Give me a coke,' or 'a cola.' I do not think I am getting 'Coca-Cola' when they serve it to me. People in asking for a drink at the ball park by the names 'coke' or 'dope' can tell they are getting 'Star-Cola,' and that it is not 'Coca-Cola,' by the crown on the bottles, and the advertising in the park that Diehl & Lord have exclusive rights there to sell Diehl's 'Star-Cola.' Diehl & Lord have their name blown in the bottle." (Rec., 1074-5).

PAUL E. WEBB, soda dispenser, United Cigar Stores, Nashville, Tenn.:

"I have dispensed 'Fletcher's Cola,' 'Diehl's Star-Cola,' and some other names. * * * I am dispensing now 'Coca-Cola' only. I have dispensed other cola drinks in addition to 'Coca-Cola' at various other places I have worked. I have had customers come in and ask for drinks by other nicknames. Some of the names they asked for [are] 'coke,' 'dope,' 'poison,' 'shot.' When they came in and asked for drinks by those names, they wanted any kind of drink they could get,—any kind of cola drink,—it did not make any difference. I did not consider,

when they came in and asked for a 'coke,' a 'dope,' a 'shot,' 'poison,' any of those names, that they were making specific requests for 'Coca-Cola' and nothing else. I regard those names as nicknames common to the trade, referring to cola drinks as a class. (Rec., 1119). * * * At the baseball park here at Nashville they serve 'Diehl's Star-Cola' in bottles. They ask for 'coke' and they give them that. It has a red label on the bottle. The bottle has a big label on the side of it. They ask for that by 'dope' and 'coke.' I never hear any one who asked for it by 'dope' or 'coke' reject it on the ground that it was not what they asked for. They mostly call for it by 'dope' and 'coke,' for it is advertised in the park. They have a large advertisement that says 'Call for Diehl's Star-Cola.' The boys carrying the containers they have for the bottles, they have labels all over the sides, 'Diehl's Star-Cola only.' The people who ask for 'dope' know they are getting 'Star-Cola.' (Rec., 1120) * * * Zeh's had 'Coca-Cola' and 'Diehl's Star-Cola.' When a man asked for 'Coca-Cola,' I served him 'Coca-Cola,' and if a man asked for 'dope' I served him 'Diehl's Star-Cola.' Rec., 1121) * * * 'These other drinks, they are sold in bottles, that they ask for as 'coke' or 'dope.' They had great long names, and a person would not go to the trouble of calling for them, they would just call for a 'coke' or a 'dope' and get them. * * * At the places where I was and they served only 'Coca-Cola,' when people came in and asked for a 'coke' or 'dope,' I gave them 'Coca-Cola,' because it was all I had." (Rec., 1122).

ABRANTS DARDEN, soda dispenser at Henry Skagg's, Stahlman Building, Nashville, Tenn.:

"I have been a soda dispenser for about six years. Have dispensed a great many different kinds of drinks, I could not tell all of them. The cola drinks I have dispensed are 'Fletcher's Cola,' 'Dope,' 'Coca-Cola,' and others. I cannot remember. I have known of these other cola drinks, other than 'Coca-Cola,' most ever since I have been in the business. I have had calls for drinks under the name of 'dope' and 'coke' at the soda fountains where I have worked. I have had customers come up and say, 'Give me a coke,' or 'Give me a dope.' I have had other names used. A lot of them will say, 'Give me a shot-in-the-arm; and different thinks like that. I do not regard the words 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. When a customer comes into my soda fountain and asks for a 'coke' or a 'dope,' I do not understand that he has made a definite and specific request on me for 'Coca-Cola' and nothing else. The word 'dope' means to me some cola drink, a drink of *that order*. In the places where I have worked and handled 'Fletcher's Cola,' and other similar drinks, when a customer came into my establishment and asked me for a 'dope,' I served him 'Fletcher's Cola' at time when he asked for 'dope.' At the different fountains where I had other cola drinks than 'Coca-Cola,' and customers came in and asked for 'dope,' I generally gave him what I made the most money on, when they call for a 'dope' or a 'coke.' I go out to the baseball park occasionally. 'Star-Cola' is sold out there. Out there I have heard them call for 'dope,' things like that, and that is what they gave me. I have heard them asked for it, 'Give me a dope'—'three dopes'—as many as they wanted, or 'Give me a cola,' or 'a coke.' (Rec., 1123-4 * * * When they call for 'coke' or 'dope,' as I told you, I

would give them the first cola drink I came to, according to what I was handling at that time. When they called for 'coke' or 'dope' I would give them some cola drink that we handled and was nearest to me, and sometimes 'Coca-Cola.' * * * At Skaggs' place we carry 'Coca-Cola' now, that is all; we do not carry 'Fletcher's Cola.' When they call for 'dope' or 'coke,' we give them 'Coca-Cola.' * * * What the people wanted when they asked for 'coke' or 'dope,' I always thought they meant something on the cola drink line, some kind. 'Fletcher's Cola' is cheaper than 'Coca-Cola.' That is *one* reason why I served 'Fletcher's Cola' for 'dope' and 'coke,'—and *because it is a cola drink.*" (Rec., 1126-7).

P. E. JOHNSON, soda dispenser, Nashville, Tenn.:

"We dispense sodas of all different flavors. We dispense 'Cola-Cola' and a black syrup called 'Dope.' They used 'Fletcher's Cola,' and have used 'Diehl's Star Cola.' * * * When customers come into our fountain and ask for a 'coke' or 'dope,' we serve them 'coke' or 'dope.' When we handled 'Fletcher's Cola' and they asked for 'coke' or 'dope,' we served 'Fletcher's Cola,' and when we were handling Diehl's 'Star-Cola,' we served Diehl's. When I was serving these drinks in response to their requests, I considered I was giving what they asked for. The name 'coke' or 'dope' means fifty, or a hundred, or more, drinks in a class. They mean a class of drinks. I do not consider that when a man comes into our fountain and asks for a 'coke' or a 'dope' that he is making a definite and specific request on me for 'Coca-Cola' exclusively. Some of the cola drinks I know of are: 'Afri-Cola,' 'Gay-Ola,' 'Fletcher's Cola,' 'Diehl's Cola.' And I know there are a num-

ber of different ones on the market but I do not recall their names. I have heard these names, 'coke' and 'dope,' applied to soda fountain drinks since I have been going around and calling for drinks myself. * * * At the baseball park here in the summer they serve 'Pepsin' and Diehl's 'Star-Cola' and the other drinks that run in that class. Diehl's 'Star-Cola' and the other drinks that run in that class. Diehl's 'Star Cola' is all that is advertised out there. The boys holler: 'Star-Cola,' Diehy's 'Star-Cola!' * * * If people ask for 'coke' or 'dope' at the ball park, they get Diehl's Cola. When they get Diehl's Cola they know they are getting that because it is labeled. (Rec., 1151-2). * * * When I went there and a man came in and asked for a 'coke' or a 'dope,' I would not know what he wanted. There are so many so-called 'cokes' and 'dopes' on the market, and one specific 'Coca-Cola,' I would not know, I could not state positively what he might want, but I imagine, from the advertisements, etc., that he would call for 'Coca-Cola' if he wanted 'Coca-Cola.' "

J. E. DUNN, a soda dispenser, Nashville, Tenn. :

" 'Star-Cola' is about the only cola drink I have ever dispensed to amount to anything, except 'Coca-Cola.' I have known of other colas on the market ever since I have been in the business, and that has been about seven years. Some of the other cola drinks I know of are 'Fletcher's Cola,' 'Star-Cola,' 'Matthew's Cola.' We do have, and have had customers at the other places, come into the soda fountain and ask for a 'dope' or a 'coke.' When I was dispensing 'Star-Cola' and they asked for 'coke' or a

'dope,' I would give them "Star-Cola," because it was the only one I had, and I considered that I was giving them what they wanted, because they practically all knew what I had. I did not consider that he had made a specific and definite request for 'Coca-Cola' only. * * * The words 'coke' and 'dope' means, as applied to a soda fountain beverage, different kinds of drinks,—all this kind of stuff that is trying to imitate 'Coca-Cola,—it refers to the 'dope' drinks as a class." (Rec., 1157-8-9).

W. W. RANDOLPH, a soda dispenser, Nashville, Tenn. :

"Some of the cola drinks that we have dispensed are 'Star-Cola,' 'Mi-Cola,' 'Pepsi-Cola,' and I guess about a dozen others. * * * I have heard of about a dozen cola drinks on the market several years back,—as well as I can remember, about eight years, anyway. In asking for the cola drinks at our fountain, customers most all of the time call for 'dope.' When they call for 'dope' I give them any of those cola drinks I happen to have at that time. * * * When customers come in and ask for a 'coke' or a 'dope,' they want any of those colas, unless they specify one certain drink. I do not regard the words 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. When a customer came into our fountain, while I was dispensing there, and asked for a 'coke' or a 'dope,' I did not consider that he had made a specific and definite request on me for a 'Coca-Cola' only. * * * They dispense cola drinks at the baseball park. They serve Diehl & Lord's cola there,—that is served in bottles. They call for a 'dope' or a 'coke' or just any of those names, in asking for it out there, and are served with this Diehl

& Lord's cola there. I never heard any one object to it and say it is not what they wanted, when they were served with it in a call for a 'coke' or a 'dope.' * * * The word 'coke' or 'dope' is used for all these drinks. I use it to apply to these different drinks. I do not think they only mean 'Coca-Cola' when they ask for a 'dope.' If they call for a 'dope,' they do not mean 'Coca-Cola,' they mean any line of these drinks." (Rec., 1160-1).

J. M. SMITH, proprietor of lunch room and soda fountain, Nashville, Tenn.:

"I dispense everything that they sell over a soda fountain, a general line of soda fountain drinks, and the different kinds of coca-cola and other cola syrups. I have dispensed 'Gerst's Cola,' 'Gay-Ola,' 'Star-Cola,' and now a new syrup,—cola drink,—put up by the Southern Fountain Supply Co., I do not remember what they call it. Customers calling for these cola drinks invariably ask for 'dope.' I have a good many customers who come in and ask for a 'Coca-Cola,' and some ask for 'dope' and some ask for 'coke,' and names like that. I give them, when they ask for 'dope' or 'coke,' either 'Star-Cola' or 'Gerst's Cola,' or some one of these cola syrups. I have given 'Coca-Cola' under the name of 'dope' and 'coke.' * * * When customers ask for 'dope' or 'coke,' I understand it is any kind of a cola drink, — not a definite and specific request for 'Coca-Cola' exclusively. I am now dispensing a cola syrup that is put up by the Southern Fountain Co. I do not remember what they call it; it is put up by Mr. Matthews, I believe, * * * I call this cola syrup 'dope.' He sells it to me under that name. I understand 'coke' or

'dope' is attributable to any kind of cola drink * * * I have heard these words 'coke' and 'dope' applied to soda fountain beverages ever since I can remember,—about fifteen years, something like that. I have been working in and around soda fountains for about that length of time. The greater part of the time I have had other cola syrups on the fountain as well as 'Coca-Cola' syrups. I never had a customer reject any of the other drinks, other than 'Coca-Cola,' when they have asked for it as 'coke' or 'dope' and I served it to him in response to a request for 'coke' or 'dope,' on the ground that it was what he asked for. They serve 'Star-Cola' at the ball park exclusively, and have done so the last two or three seasons. They ask for it as 'dope,' and they serve them 'Star-Cola.' * * * 'Star-Cola' is blown in the bottle. The boys call 'Star-Cola.' I have heard some men say, 'give me a dope,' and they would sell them this 'Star-Cola' they were peddling. * * * When customers ask for 'coke' or 'dope,' I think they are asking for any kind of cola drink." (Rec., 1182-4).

J. C. PRICE, formerly soda dispenser, but now running a restaurant, Nashville, Tenn.:

"There are many different brands of cola drinks I have served. I could not call them all, I know a few,—'Arrow-Cola,' 'J. D. F. Cola,' 'Koke and Cola,' 'Gay-Ola,' 'Afri-Cola,' and I have dispensed 'Star-Cola' and 'Gerst's Cola,' too, and 'Coca-Cola.' I have worked here in Nashville, St. Louis, Evansville and Birmingham. At these different towns I sold different cola drinks. (Rec., 1205). * * * The words 'dope' and 'coke' mean, in my opinion, a cola drink containing caffeine. I have had customers

come in and call for a 'dope' and call it by its name, —for instance, 'J. D. F. Cola,' or 'Koke and Kola,' —they would prefer it to 'Coca-Cola.' * * * I have been out to the ball park here; they sell and advertise 'Star-Cola' out there. I have heard people out there, patrons, asking for 'dope' and coke.' I have hollered at the boy to give me a bottle of 'dope,'—I call it 'dope,'—and he would give me 'Star-Cola.' You could tell by the bottle they were not giving you 'Coca-Cola.' It said 'Diehl's Star-Cola' on the bottle, and on the crown. (Rec., 1206). * * * I do not consider, when I go into a soda fountain and ask for a 'coke' or 'dope,' that I am making a definite and specific demand upon the dispenser to give me a 'Coca-Cola' and nothing else, because, if I wanted a 'Coca-Cola,' I would ask for it when I went in. (Rec., 1208). * * * I do not consider when a customer asks for a 'coke' or 'dope' that he has asked specifically for 'Coca-Cola.' " (Rec., 1209).

W. M. SIDEBOTTOM, in the confectionery and soda water business for thirty years, and now manager of Skalowski's, Nashville, Tenn.:

"At the establishment where I am now located we dispense *Atlanta* 'Coca-Cola,' we dispense no others besides that. I have heard customers come in and ask for 'dope' or 'coke;' they did it every day. Fifteen or eighteen years ago when they came in and asked for 'coke' or 'dope,' it depended upon the humor of the dispenser what he gave them; he would give them 'Coca-Cola,' or whatever kind of cola we may have on hand. My opinion is that 'coke' and 'dope' apply to any cola drink, and when a man comes into a soda fountain and asks for a 'dope' or 'coke,' I do not consider that he has made a definite and

specific request for 'Coca-Cola,' but a cola drink, and that has been true for fifteen years anyway. The firm of Dorider & Sidebottom had the concessions at Glendale, and we dispensed, my recollection is, about three kinds of cola, 'Celery-Cola,' 'Coca-Cola,' and I think there was another cola on the market then. My impression is that we had three kinds of cola. Away back there if they asked for 'dope' or 'coke,' we would give them either one we had." (Rec., 1163).

J. G. BOOTH, soda dispenser, Nashville, Tenn.:

"We are dispensing 'Coca-Cola' straight at the place where I am working now. I have known of cola drinks ever since I have known the original Coca-Cola; I suppose it would be five or six years. Customers come into the soda fountain and ask for a 'coke' or a 'dope,' and call for lots of different names, as 'coke,' 'dope,' 'shot-in-the-arm,' 'shoot me,'—anything like that,—and 'Coca-Cola.' (Rec., 1169). * * * When a customer came into our place of business and asked for a 'dope' or a 'coke,' I would think he was asking for a 'dope' or a 'coke,'—there are so many different ones on the market, I would think he was asking for a class of drink, instead of some specific drink. If he wanted the original 'Coca-Cola,'—if he is that particular about it,—he ought to call for it under the real name of 'Coca-Cola.'" (Rec., 1170).

MATT WILSON, a retail druggist, Nashville, Tenn.:

"I dispense 'Gerst's Cola.' (Rec., 1209). * * * I do not handle any other cola drink. Customers coming in and asking for that drink ask for a 'dope,'—'give me a dope.' I serve them, in response to that request, this 'Gerst's Cola.' When customers

come in and ask for a 'dope,' I do not consider they are making a definite and specific request for 'Coca-Cola;' if they did, they would ask for 'Coca-Cola.' I have had some few ask for 'Coca-Cola,' and I would tell them that I did not have it, and they would say, 'give me some of that other dope.' Before I went into the drug business I was in the saloon business. Ever since I can remember we handled cola drinks there. 'This 'Gerst's Cola,' I had the syrup and made it just like I do now,—made it from the syrup drawn from a spigot by adding carbonated water. Customers used the name 'dope' in asking for it there. Some did not know what it was; they would say, 'It is better than I can get at a soda fountain.' I said, 'This is Gerst's.' " (Rec., 1209-10).

F. H. WILLIS, soda dispenser, Nashville, Tenn.:

"We have customers come into our soda fountain and ask for a 'dope' or a 'coke.' I give them a cola,—'Candy-Cola.' (Rec., 1191). * * * When a customer asks for a 'coke' or a 'dope,' my understanding is that he wants just some cola that we might have, that we dispense there. When they ask for 'coke' and 'dope' and I serve them 'Candy-Cola,' I consider we are giving them what they ask for. * * * 'We have always dispensed 'Fletcher's Cola.' They ask for that as 'dope' and 'coke.' I do not regard the names 'coke' and 'dope' as the names of a particular cola drink." (Rec., 1192).

WILLIAM F. DAVIS, a practicing attorney of the Nashville Bar, and president and general counsel of the Davis-Fuston chain of drug stores, Nashville, Tenn.:

"We dispense cola drinks. Some [of the] drinks are 'Coca-Cola,' 'Afri-Cola,' 'Fletcher's Cola,' 'Ala-Cola,' 'Arrow-Cola,' I believe it is,—'Star-Cola,' 'Gerst's Cola,' not all of those at every place,—at different places at different times we have used these cola drinks. * * * I frequently hear customers come in and ask for a 'coke' or 'dope.' My instructions to the men are to sell the drink they think will give the best satisfaction. I do not instruct them to sell any particular brand of drink when a customer asks for a 'coke' or 'dope.' We give the one that has given the best satisfaction in the neighborhood,—that is sometimes not the same drink in different neighborhoods. When customers come in and ask for a 'coke' or a 'dope' at our fountain, we do not understand they are making a definite and specific request for 'Coca-Cola' exclusively. (Rec., 1102). * * * I do not think we ever had anybody reject any of the cola drinks we served them when they asked for them as 'coke' or 'dope,' on the ground that it was not the drink they asked for. Occasionally customers who come into our store and ask for drinks as 'coke' or 'dope,' and indicate to us the particular brand of drink they want. I think probably here 'Fletcher's Cola' is called for maybe more than any other, except 'Coca-Cola.' * * * I do not regard the names 'coke' and 'dope' as specific and definite nicknames for 'Coca-Cola' exclusively. I regard them, particularly 'dope,'—as a common name [applicable] to a class of drinks,—the caffeine or cola drinks. When a man comes into our establishment and asks for a 'coke' or a 'dope,' and is served with 'Star-Cola,' 'Fletcher's Cola,' or any other cola drink at our fountain, I consider that we are giving him what he is asking for." (Rec., 1103).

SUMNER FUSTON, a stockholder in the Davis-Fuston chain of drug stores at Nashville, Tenn., and manager of one of the stores:

"We have customers come into our store and ask for 'coke' or 'dope.' We serve, when they ask for 'coke' or 'dope,' 'Fletcher's Cola.' * * * I handled *Atlanta* 'Coca-Cola' because I was out of 'Fletcher's Cola,' and Fletcher could not get it to me as quickly as I liked, so I ordered a gallon out from Spurlock Neal with my regular morning order. Well, the trade was just not satisfied with it. They kicked on it. I knew they were not use to it, because I had always served the other, so I did not serve it any more. The other syrup always appeared to be a richer syrup, a heavier bodied syrup and seemed to suit them. That was why I quit handling *Atlanta* Coca-Cola. I have a sign up at the fountain saying I handle Fletcher's Cola. I have had it up there for a long time. I know this, the trade is satisfied with it. I have been serving them for years and they do not know anything else except what I have been serving them. I have a line of trade that I have been doing business with for years, ever since I have been there. * * * I had the *Atlanta* Coca-Cola complained of as not what was asked for when it was served to a man in response to a request for coke or dope."

GEORGE R. EDMONDSON, retail druggist, Atlanta, Georgia:

"If a man comes into my store and asks for a 'dope,' I think he wants a cola.'" (Rec., 1301).

J. L. DRAKE, head dispenser at Nunally's, Birmingham, Ala.:

"I have been a soda dispenser for about ten years. I have dispensed 'Coca-Cola,'—that is the only one. I have heard of several other cola drinks on the market,—quite a few. Some of them are 'Rye-Ola,' 'Gay-Ola,' 'Chero-Cola.' If I had 'Coca-Cola' in the fountain and 'Rye-Ola' in the fountain together,—not in the same container, but in the same fountain,—and a customer should come in and ask for a 'dope,' I would give him the one I made the most money out of, if he asked for a 'dope.' * * * If he asked for a 'dope' and I served him with 'Rye-Ola,' I would consider I gave him what he asked for. * * * I do not consider 'dope' specifies any particular drink. I have never termed it that way. * * * I handle root beer at our fountain. It is made by the John Hungerford Smith Co. I have never dispensed any 'Hires' root beer. I was in stores where it was dispensed. 'Hires' root beer is extensively advertised. If they specify 'Hires' root beer, we have not got it, but if they just ask for *root beer*,—if they do not specify '*Hires*,'—we give what we serve. If I had two root beer,—this root beer I now have and '*Hires*' root beer,—and a customer came in and said, 'give me a *root beer*,' I would give him the cheaper article. I would consider I had given him what he asked for." (Rec., 1403-4).

R. A. THORN, retail druggist, Meridian, Miss.:

"I dispense all of the different drinks,—lemon, orange, vanilla, 'Coca-Cola,' 'Dope' and 'Koke' syrups. I get this 'Dope' syrup and this 'Koke' syrup from the Southern Koke Co., New Orleans.

Other cola drinks that I have handled are 'Ko-Nut,' 'Coca-Cola' and 'Afri-Cola.' (Rec., 1420). * * * When customers come in and ask for 'dope,' I do not consider that they are making a definite and specific request on me to serve them with 'Coca-Cola' exclusively. When I was handling 'Coca-Cola' exclusively, and they asked for 'dope,' I served them with 'Coca-Cola,' because that was the only cola syrup I handled at that time. If I had had any other cola syrup at that time, and they asked for a 'dope,' I would have served them the first cola syrup that was in reach of me, I guess,—the one most convenient. What I have just said applies to 'coke' just as well as it does to 'dope.' At that time it was the only cola syrup known and the only cola syrup supposed to contain any drug or 'dope,' and I therefore thought they were specific requests for 'Coca-Cola.' That was before I heard of the others; before any other cola syrup was on the market around here, so far as I know." (Rec., 1425-6).

H. F. CRISLER, a retail druggist, Jackson, Miss.:

"I handle 'Coca-Cola' and 'Dope.' I get this 'Dope' from New Orleans, the Southern Koke Co. I handled 'Ko-Nut.' Customers come in and ask for a 'Coca-Cola' if they want the genuine 'Coca-Cola;' if they want some other cola drink, they ask for a 'coke' or a 'dope.' I know I am giving them what they want, because that satisfies them, and if I serve them 'Coca-Cola' it does not satisfy them. I have had customers come in and ask for a 'dope' and I served them with 'Coca-Cola,' and they would say it did not satisfy them, or reject it. It has occurred quite often, when we would be out of the 'Dope' syrup and have to use 'Coca-Cola,'—quite often we

would have complaints on the syrups, on the drink they were getting,—almost invariably from the regular customers.” (Rec., 1426-7).

H. M. TODD, a retail druggist, Jackson, Miss.:

“We dispense just one cola drink, ‘Ko-Nut,’ out of Atlanta. The fellow I bought out used it and I continued using it. Mr. Clark, who was traveling for them, quit the ‘Ko-Nut’ people, and started in business for himself and went to manufacturing a ‘dope’ of his own,—‘Miss-Ola,’ I believe. I used one barrel of it, which did not give us satisfaction, and we quit, and we started using a preparation put up by the Southern Koke Co., called ‘Koke.’ Our customers, in asking for these cola drinks, ask for ‘dope’ and ‘coke.’ I give them ‘Dope,’ all we have got. I mean by ‘Dope,’ this New Orleans product, of the Southern Koke Co. Before I began to handle that, when they asked for ‘dope’ or ‘coke,’ I gave them ‘Ko-Nut.’ When our customers asked for ‘dope’ or ‘coke,’ and I served them either ‘Dope’ or ‘Koke’ made by the Southern Koke Co., of New Orleans, in a way I considered I was giving them what they asked for,—something on the same order as dope. We never had any customers turn it down or reject it, when served to them in response to calls for ‘dope’ or ‘coke,’ on the ground that it was not what they asked for. We have had them to send back ‘Coca-Cola’ and ask for ‘Dope.’” (Rec., 1438).

ROBERT E. OUSLEY, a retail druggist, Kosciusko, Miss.:

“We are dispensing ‘Coca-Cola,’ and we have one called ‘Koke’ and ‘Dope.’ ‘Koke’ and ‘Dope’ is

shipped from New Orleans, from the Southern Koke Company, Limited. I have dispensed 'Ko-Nut' syrup. It is a cola drink. (Rec., 1442). * * * When customers come into my place of business and ask for a 'dope' or a 'coke,' I do not consider that they are making a definite and specific demand on me for 'Coca-Cola' exclusively." (Rec., 1449).

HUGH LEE BOYD, a retail druggist, Kosciusko, Miss.:

"I am dispensing the Southern Koke Company's 'Koke' or 'Dope,' and 'Coca-Cola.' I have dispensed this Hagan & Dodd drink, 'Ko-Nut.' Customers indicate to me that they want a cola drink by asking for a 'coke,' 'dope,' 'give me a shot,' and things like that. When customers come in and ask for a 'coke,' 'dope,' or a 'shot-in-the-arm,' or 'shot,' I do not understand or consider that they are making a definite and specific request on me for 'Coca-Cola' and nothing else. (Rec., 1450-51). * * * 'Dope' and 'coke,' 'cola,' and 'shot-in-the-arm,' mean any cola drink. I have been hearing it ever since I have been big enough to hear. I always had my mind made up that way. I think they are nicknames for any cola. I think they could be nicknames for 'Coca-Cola' as well as nicknames for 'Gay-Ola' or 'Dope.' I never thought they applied exclusively to 'Coca-Cola.' (Rec., 1453). * * * The public at large mean by 'coke and 'dope' *any* cola drink, because *they come under that head.*" (Rec., 1454).

C. J. THORNTON, a retail druggist, Hattiesburg, Miss.:

"I dispensed at my soda fountain a general line of all flavors, and I sold 'Afri-Cola,' 'Coca-Cola,' 'Dope,' 'Ko-Nut,' 'Luck-Ola.' I never sold any 'Gay-Ola.' When customers came into my soda fountain and wanted a cola drink, I kept track once, and 90 per cent. would call 'dope.' When they called for 'dope,' I would give them anything I had in the line of 'Ko-Nut' and 'Gay-Ola,'—I mean 'Afri-Cola,'—'Koke' or 'Dope,' any cola drink. When my customers came in and asked for 'dope' and I served them 'Ko-Nut' or 'Luck-Ola,' I considered I was giving them what they asked for. I never had any customers refuse any drink served, when asked for 'dope,' on the ground it was not what he asked for. (Rec., 1859). * * * When customers come in and ask for a 'dope,' I do not consider they are making a definite and specific request on me for 'Coca-Cola' exclusively. Take 'Dr. Pepper's,' that is the first I ever heard called 'dope,' and, oh, that has been about five years ago, I was in Shreveport, I heard it called 'dope.' * * * The word 'dope,' as applied to a soda fountain beverage, means any cola drink." (Rec., 1760).

J. E. JONES, a retail druggist, Hattiesburg, Miss.:

"I have dispensed 'Coca-Cola,' made by the Coca-Cola Co., and 'Ko-Nut,' by Hagan & Dodd and made in Atlanta. When customers came in and asked for these cola products, the average run of customers ask for 'dope' or 'coke,'—'dope,' usually. I served 'Ko-Nut' when I handled it. * * * When customers came in and asked for a 'dope' and I served them with a 'Ko-Nut,' I considered that I gave them what they asked for at that time. * * * I cannot remember that we ever had a customer to refuse 'Ko-Nut'

when served him on requests for 'dope' or 'coke.' (Rec., 1796-7). * * * I have never considered, when a customer came in and asked for a 'dope' or a 'coke,' that he was making a definite and specific request on me for 'Coca-Cola' exclusively." (Rec., 1801).

F. J. WILLIAMS, a retail druggist, Hattiesburg, Miss.:

"We dispense 'Dope,' 'Koke,' 'Ko-Nut' and 'Coca-Cola.' This 'Koke' and 'Dope' are from the Southern Koke Co. When customers come in and ask for 'coke' or 'dope,' we give them 'Koke' or 'Dope.' If a customer comes into our drug store and asks me for either a 'coke' or a 'dope,' I do not consider that he has made a definite and specific demand on me for 'Coca-Cola' exclusively. When he asks for a 'coke' or a 'dope,' and I serve him this New Orleans product, I think I give him what he asked for. I have never had a customer reject the New Orleans product, 'Koke' or 'Dope,' when he asked for it as 'coke' or 'dope,' on the ground it was not what he asked for." (Rec., 1807-8).

W. A. HICKMAN, a retail druggist, Monticello, Miss.:

"We dispensed 'Coca-Cola,' 'Dope' and 'Koke.' * * * When customers come in and want a cola drink, they use different names,—'coke,' 'dope' and 'Coca-Cola.' * * * The word 'dope' means, as applied to a soda fountain beverage,—why, I do not know, I do not guess it means any particular brand. (Rec., 1821). * * * When a customer calls for a 'coke' or a 'dope,' they want any cola drink. * * * A lot of people call for 'coke' or 'dope' and do not know what they want. I have asked several. Asked what

kind of drink you want. They say, I don't know, anything,—what kind of cola do you sell here? (Rec., 1823). * * * I do not know whether a man wants Coca-Cola or not when he calls for 'dope' or 'coke.' * * * and the reason [why] I do not know what they want when they ask for 'dope' or 'coke' [is that] they do not designate any specific drink."

A. S. GOODY, a retail druggist, and mayor of Lucedale, Miss.:

"I dispense 'Dope' and 'Coca-Cola.' This 'Dope' is bought from New Orleans,—the product of the Southern Koke Company, Limited. I consider the word 'dope' means anything in that line,—of 'Coca-Cola' or cola beverages,—like 'Ko-Nut,' 'Afri-Cola,' 'Gay-Ola,' any of those cola drinks,—rather an indefinite term. It does not mean any specific one,—no specific brand of cola drinks." (Rec., 1786).

BURTON JONES, a retail druggist, St. Elmo, (a suburb of Chattanooga) Tenn.:

"I have had calls for 'dope' at my establishment. When a customer asks for a 'dope' he wants a cola drink of some kind. * * * When customers come to my store and ask for 'a dope' we serve 'Coca-Cola.' * * * At the time we had 'Tru-Cola,' we usually gave 'Tru-Cola.' They were satisfied with it,—anyway I gave them the 'dope.' None of them ever refused 'Tru-Cola' on the ground that it was not what they asked for. (Rec., 1006). * * * Up to the time I started handling 'Tru-Cola,' three years before January 8, 1914, I only handled 'Coca-Cola' and nothing else of that kind. Northern people would come in there and say, 'Give me a dope,' and, naturally,

we give them a cola drink, but they say that is not what they want. * * * We have a great many tourists that call ice-cream soda 'dope,'—that is what they call it. Up to the time we put in 'Tru-Cola,' we served 'Coca-Cola' for 'coke' or 'dope.' * * * I served them [the] only 'coke' or 'dope' I had, prior to the time I put in 'Tru-Cola,' and then, when I got two kinds, I served first one and then the other. If I had had any other cola drink on hand besides 'Coca-Cola' before I began handling 'Tru-Cola,' I suppose we would have done the same as I did do when I handled both. * * * I handle cigars, also, and have customers come in and say, 'Give me a *cigar*.' If he does not point out some *particular brand* he wants, I usually give him a bunch of cigars made here in Chattanooga that costs us \$31.00 or \$32.00." (Rec., 1012-13).

C. H. JOUETT, a drug clerk at the Live & Let Live Drug Store, formerly at Miller Pharmacy, Chattanooga, Tenn.:

"I have served 'Coca-Cola' in response to requests for 'dope.' * * * As a matter of convenience, when I have 'Ala-Cola,' 'Ko-Nut' and 'Coca-Cola' in the jars, I serve either one I feel disposed to. It is like going into a bar room and asking for a glass of beer; if I do not *specifically* ask for 'Hauck's' or 'Budweiser,' I get a glass of *beer*. * * * If I go into a fountain and ask for 'a shot,' I do not care what he gives me, so long as it is a *cola* drink. If a customer comes to my store and asks for 'a shot,' he gets 'Ko-Nut' or 'Ala-Cola,'—any cola drink. That has been so at nearly all the places I have been with at fountains. At each fountain where I have been, when they asked for 'dope,' I just gave them any

of them, it did not make any difference." (Rec., 1054-5).

DR. H. O. NULL, a practicing physician and also proprietor of a soda fountain, Highland Park (a suburb of Chattanooga), Tenn.:

"We handle cola drinks. The only cola drink we have now is 'Coca-Cola,'—and 'Ko-Nut.' I have handled a number in my time. I have handled Wise-Ola and Luck-Ola at one time, and 'My-Ola.' I have handled 'Coca-Cola' during the time I have had the soda fountain. We have always handled some other cola drink. (Rec., 1063). * * * My customers use a good many different names; now, I do not know whether it is particularly these cola drinks or not, but they come in and call for 'dope,' and 'coke,' and 'shot,' and 'Give me a dose of lead,' and everything else. When they use these names I believe it is generally known that they want a cola drink. When a man comes into my soda fountain,—a customer,—and asks for a 'dope' or a 'coke,' I do not understand that he has made a definite and specific request for 'Coca-Cola' exclusively. He has not asked for 'Coca-Cola.' When customers come in and ask for 'dope,' 'coke,' or 'shot-in-the-arm,' I serve what we have; if we have 'Coca-Cola,' if we have 'Ko-Nut,' we give them either one of them. * * * I regard the names 'coke' and 'dope' as nicknames for that class of drinks,—that has always been my diagnosis of that class of drinks. I have never had any of my customers refuse any of my cola drinks that I have served in response to requests for 'coke' or 'dope,' 'shot,' or 'lead,' or anything of that sort, on the ground that it was not what they asked for." (Rec., 1064-5).

J. M. WHEELER, bar tender, Chattanooga, Tenn.
(Rec., 970-2):

"I handle * * * 'Coca-Cola,' 'Maud Muller,' 'Koke,' 'Rye-Ola,' and 'Tru-Cola.' * * * I have had customers come into my place and ask for a 'dope,' and, when they do, I give them some kind of cola drink. I serve them the first thing that is handy when they ask for a 'dope,'—any kind of cola drink. I have served 'Rye-Ola' and 'Tru-Cola' when they ask for a 'dope.' When customers ask for a dope, I take it for granted they want some kind of cola drink,—they do not want any particular kind. I do not regard a request from a customer for a 'dope' as a specific request for 'Coca-Cola' exclusively. When customer come in and ask for a dope, I take it for granted that any kind of a cola drink will suit them. * * * I have never had any of these cola drinks, other than 'Coca-Cola,' refused on the ground that it was not what they asked for, when a customer asked for a 'dope' and I served this other drink in response to that request. I am about my stand most all of the time so I can hear the requests my customers make for drinks that way; the customers ask for these cola drinks in just any kind of a name. 'What have you got, what kind of soft drink have you? Sometimes I will call over what I have for them and they will say, 'Any of them will do,—it doesn't make any difference to them. I serve near-beer to customers by nicknames, too. Some of the nicknames they ask for it by are: 'a glass of foam,' 'slop,' 'suds,' and so on. I do not regard that as a specific request for some particular brand of near-beer. They just want something out of the keg. I regard those names a general nicknames and applicable to that class of drink. 'Dope' is pretty

much the same way,—they just want something of that *kind* of drink; they don't mean any one drink when they come in and call for 'dope.' ” (Rec., 970-971-972).

E. W. FREEMAN, bar tender for thirteen years, Chattanooga, Tenn.:

“During all this time in Chattanooga, I have handled cola drinks. Some of the drinks are ‘Coca-Cola,’ ‘Rye-Ola,’ ‘Ala-Cola,’ ‘Maud Muller.’ * * * I have been about the bar so I could hear the words customers used in asking for the different drinks they wanted. I am a bar tender, and have known of cola drinks, other than ‘Coca-Cola,’ possibly eight years, and perhaps longer. I have been handling other cola drinks since I have been in the saloon business,—the greater portion of the time. * * * When customers come into my store and ask for a ‘dope,’ I give them most any dark colored bottled drink,—‘Koke,’ or that ‘Ala-Cola,’ it used to come handy, and I used to give a good deal of that ‘Maud Muller,’—I give all of these. (Rec., 973-974). * * * I understand, when a customer asks for a ‘dope,’ that most anything you give him out of a dark bottle suits him just as well as if he had called for any particular name,—a drink of that class, a cola drink, a drink of that same general taste, color, exhilarating effect, and so forth. I take ‘dope’ in general as a name for all of those colored drinks. * * * I have heard only ‘coke’ and ‘dope’ applied to these cola drinks. I have heard of these names, ‘coke’ and ‘dope,’ a fair estimate, of about eight years. * * * I served beer at my establishment, and the names they ask for it by besides beer, are: ‘German courage,’ ‘suds,’ and such as that, something like

that. I do not regard requests for beer under those names as requests for any specific brand of beer. (Rec., 974-975). * * * If a man came into my place of business and asked for a 'coke,' I would give him almost anything,—the first thing I got my hands on, if I was very busy. Sometimes I asked him if he wanted 'Coca-Cola.' He would say, 'Give me some dope, I don't care.' (Rec., 977).

R. F. ZIMMERMAN, proprietor of the Union Bottling Works, Chattanooga, Tenn.:

"When I first went into business I bottled a cola drink that I made myself,—practically five years ago; I didn't have any special name; the wagon men called it 'dope,' generally, in selling it to the trade, they would holloo, 'Give me a case of dope.' We didn't have any name on it,—just a plain crown and no label whatever, in a black bottle, and called it 'Dope.' We would throw it out if they called for 'coke;' we gave them the same thing, 'coke' or 'dope.' (Rec., 978-979). * * * There is another one in town,—'L'Aroma,'—that is a dope drink. (Rec., 981). * * * When I first come South was the first time I ever heard or knew of any 'coke' drinks whatever in any way." (Rec., 984).

A. F. ENSINGER, bar tender at Eagles Club, Chattanooga, Tenn.:

"I am about the bar so I can hear the names people use in asking for drinks they want. I dispense cola drinks. Some of the cola drinks I have dispensed are: 'Coca-Cola,' 'Koke,' 'Ala-Cola,' 'Tru-Cola,' 'Ozeola,' 'Maud Muller.' * * * I have known of other cola drinks on the market for fourteen years

past. * * * I have calls at my place of business under the name 'dope.' I generally give them a cola drink of that sort, whatever I have to give them. I do not know as they have made a specific request on me for 'Coca-Cola' and nothing else. I never had any customers reject any cola drink served to him in response to a request for a 'dope,' other than 'Coca-Cola,' on the ground that it was not what he asked for. I am still handling 'Coca-Cola.' I regard 'dope' as a name for that class of drink, and not a specific name for 'Coca-Cola.' I also dispense beer. There are numerous nicknames for it, such as 'suds,' 'Dutch disturbance,' and various other names. When a man comes in and asks for 'suds,' or 'Dutch disturbance,' I do not understand that he is asking for any specific brand of beer. * * * I have heard the word 'dope' used long before I went into the bar tending business,—when I was still a baker. I understood the word 'dope' to mean, as applied to soft drinks, that they wanted a drink of that *kind*,—a *cola* drink." (Rec. 984-985-986).

TOM COLLINS, bar tender, Chattanooga, Tenn.:

"Some soft drinks we have are white soda, 'Koke,' 'Coca-Cola,' 'Poinsetta;' I think that is about all. I know of 'Ala-Cola' and this 'Maud Muller,' but we do not handle them any more. I have known of soft cola drinks on the market five or six years. (Rec., 988). * * * Customers come in and ask for 'dope.' Of course they call all of them 'dope,' some of them do. * * * When a customer comes in and [asks for a 'dope'], I do not understand that he has made a specific and definite request for 'Coca-Cola' only. Lots of times they come in and say, give them a 'dope.' I ask them what kind. * * * In dispensing, when

I have had customers ask for a 'dope,' and have dispensed to them a cola beverage other than 'Coca-Cola,' I have never had that beverage rejected on the ground it was not what they asked for. (Rec., 989). * * * When a man comes in I ask him what *kind* of 'dope' he wants. Sometimes he says 'Koke,' and other time 'Coca-Cola.' We handled that 'Ala-Cola' and 'Maud Muller,'—they called 'Ala-Cola' 'dope,' too. I never had 'Ala-Cola' rejected by any of my customers, when asked for by the name of 'dope,' on the ground it was not what they asked for." (Rec., 990).

JOE QUINN, bar tender, Chattanooga, Tenn.:

"We handle 'Koke,' white soda, 'Poinsetta, and 'Sinalco,'—and this Panpepsin,' we have that, too. We get 'Koke' from the Chattanooga Bottling Co. 'Ala-Cola,' we handled that. Other cola drinks I handled besides that were 'Star-Cola,' 'My-Cola,' and the stuff made by Mayfield, and had some made by Gerst,—I forgot the name of it. I have known of 'Tru-Cola,' and other cola products on the market similar to 'Coca-Cola,' for ten or twelve years. (Rec., 991). * * * All of them cola dopes, one is the same as another. (Rec., 992). * * * It was well known that we did not handle 'Coca-Cola,' and still they asked for 'dope' and 'coke.' * * * I have heard the name 'dope,' as applied to soft drinks, for seven or eight or ten years,—as long as I have been working around the business. In Nashville, when they asked for 'dope,' I gave them what we had in the house, * * * if I had 'Gay-Ola,' I gave them that. When a customer comes in and asks for a 'dope,' I understand that he has made a request for what I have *in that line*; I do not regard the word 'dope'

as a specific and definite nickname for 'Coca-Cola,' no more than one of the others. I understand when customers ask for a 'dope,' they want anything we have got *in that line*. All of it is dope to me, I do not know one from the other. I do not know, I guess they call that 'Koke' 'dope,' I guess they call 'Coca-Cola' 'dope,' and they call 'Ala-Cola'—whatever we have got *in that line*, they call all of it 'dope.' Recently trade has been very strong for 'Koke.' (Rec. 933-4). * * * *Lemon soda* is not known as a 'dope.' *Sarsaparilla* is not known as a 'dope.' *Root beer*, is known as *root beer*. '*Paupepsin*' is not known as 'dope,' neither is '*Poinsetta*' or '*Sinalco*'. (Rec., 995). * * * When I handled 'Coca-Cola' by itself, and a man asked for a 'dope,' I gave him 'Coca-Cola,'—that was the only thing I had." (Rec., 996).

F. E. HOOVER, a retail grocer, Chattanooga, Tenn.:

"I have handled cola drinks. I have handled 'Coca-Cola,' I have handled 'Koke'—I handle 'Koke' now,—'Digestol,' and most all; I buy from all the wagons that go around town. (Rec., 997). * * * I have had people come into my store and ask for 'dope.' When they ask for 'dope,' I say 'What kind of dope?' I do not understand they are asking for any particular kind of drink when asking for a 'dope.' I do not regard that name as a specific and definite name for 'Coca-Cola.' (Rec., 998). * * * 'Coca-Cola' is the *oldest* 'dope' or 'coke' I remember." (Rec., 999).

M. J. COSTELLO, bar tender, Chattanooga, Tenn.:

"I have been handling soft drinks for ten years. * * * I have handled white soda, 'Digestol,' 'Sinalco,' 'ginger-ale,' 'Ala-Cola,' 'Tru-Cola,' 'Koke,' 'Rye-Ola.' * * * I have had customers come into my establishment and ask for 'dope' quite frequently. The last place I worked at did not handle any-

thing else but 'Koke' and 'Tru-Cola.' * * * I give the first thing I get my hands on. It don't make any difference. What the customer wanted when he asked for a 'dope' was a soft drink,—some kind of 'coke,'—unless they specify what they want, I give them the first I come to. You see the profits are about the same, and I just grab the first one I get my hands on. When a man comes into my establishment and asks for a 'dope,' I do not understand that he is making a definite request for 'Coca-Cola.' I think if he wanted 'Coca-Cola' and nothing else, he would call for 'Coca-Cola.' Other names customers use in asking for cola drinks are, 'give me a coke,' a 'dope,' a 'shot,' or something like that. (Rec., 1000-1001). * * * If they say, 'give me a shot,' I would give them 'Tru-Cola' or 'Koke.' If I had 'Coca-Cola' I would give them that, or whatever I got my hands on. * * * When I went to a soda fountain and asked for a 'dope,' I expected to get what he had *in that line*, whatever it was,—no particular brand. I regard 'coke' and 'dope' [as] nicknames for cola drinks as a class. (Rec., 1001). * * * 'Coke' and 'dope' [are] both applied to any kind of *cola* drink." (Rec., 1003).

A. W. STANLEY, proprietor of Hotel and Bar, Chattanooga, Tenn.:

• "I have had customers come into my establishment and ask for a dope. I asked what kind of dope they wanted, some would say Coca-Cola, and some would say 'Give me some of that new drink of Reif's, that Maud Muller,' and such things like that, you know. If he would say a dope, of course, before Koke or any other drink was introduced, come in, and we only had Coca-Cola, I would understand that he wanted Coca-Cola. Lots of fellows would come in and say 'Give me a dope.' I would

say, 'What kind of dope do you want?' and he would say, 'Give me Coca-Cola,' or 'give me something else.' You know sometimes they call Coca-Cola dope, you know how these fellows are. Customers ask for cola drinks by saying, 'Give me a shot of cocaine.'" (Rec., 1005).

R. L. WAYMAN, bar tender, Chattanooga, Tenn.:

"I handle soft drinks in connection with my business, some of them being, 'Tru-Cola,' white soda, red soda, 'Maud Muller,' 'Poinsetta,' 'Sinalco,' 'Koke,' 'Dope,'—they call it 'Dope.' Other cola drinks I have known are 'Ala-Cola.' I have known of these other cola drinks ever since I have been in business * * * I have customers come in and ask for 'dope.' I give them, when they ask for 'dope,' 'Dope,' 'Koke,' 'Tru-Cola,' 'Ala-Cola,'—something like that. * * * They would ask for 'Coca-Cola' if they wanted it. * * * If a customer comes into my establishment and asks me for a 'dope,' I do not consider that he has made a definite and specific request on me for 'Coca-Cola' and nothing else, they call all these soft drinks 'dope.' I never had any customers to refuse any other cola drinks, on the ground that it was not what he asked for, when he asked for a 'dope' or a 'coke' and some other drink besides 'Coca-Cola' was served, that I can recall. He can tell whether or not he is getting that or 'Coca-Cola.' The 'Coca-Cola' bottles here all have *the name on them, blown in the glass*, and the other bottles have not. * * * I have had customers who came in and asked for 'dope,' and knew that they were not getting 'Coca-Cola,' and who seemed to be satisfied with what they got. (Rec., 1015-16). * * * I am not positive whether it was here or in some other city, but I do remember seeing the crowns with 'D-o-p-e' on them. I have sold other

drinks when that was called for,—‘Tru-Cola,’ ‘Ala-Cola,’ and ‘Koke,’—that is what I call ‘dope.’ (Rec., 1017). * * * When I was handling ‘Coca-Cola’ alone, I would give that in response to calls for ‘cola’ or a ‘dope.’ * * * ‘Coca-Cola’ is a ‘dope’ like all the rest of the soft drinks. ‘Dope’ applies to all soft drinks,—all ‘*dope*’ stuff. Most invariably when a man calls for ‘dope,’ I ask what *kind* of ‘dope’ he wants.” (Rec., 1018).

W. F. STRICKLAND, bar tender, Chattanooga, Tenn.:

“We handled ‘Koke,’ ‘Maud Muller,’—that is a ‘dope,’—and we used to handle Zimmerman’s stuff,—‘Dope,’ I believe it was; also handled ‘Coca-Cola.’ * * * When customers ask for ‘dope,’ I give them the first thing I get hold of in a soft drink box,—‘Maud Muller,’ ‘Dope,’ or ‘Koke,’ anyone, I give the first one I get hold of, it does not make any difference. * * * If a man asks for a ‘dope’ or ‘coke,’ I give him either one I get hold of. * * * When a customer comes in and asks for a ‘dope,’ I take it for granted that he wants a ‘dope’ and does not care what it is, just so it is something cold. * * * If he says to me give him a ‘dope’ * * * I give him whatever I get hold of first. * * * The ‘Coca-Cola’ bottle has ‘*Coca-Cola Bottling Company*’ on it. I believe it has on the bottom, *Trade-Mark registered*, or something like that,—great big ‘Coca,’ and another big ‘C’, and the rest of the letters small. If they ask for the bottle I will show them. Some people want it out of the bottle. They will take it up and look at it, some people do, and want ‘Dope,’ and some people call for ‘Maud Muller,’ and some say give me a ‘Koke.’” (Rec., 1048-9).

LUKE POGUE, bar tender, Chattanooga, Tenn.:

"I have dispensed a general line of soda water, red and white, ginger-ale, 'Digestol,' 'Coca-Cola,' 'Rye-Ola,' 'Gay-Ola,' 'Ma-Cola,' 'Nerve-Ola,' 'Koke' and 'Gay-Nol.' Most all 'coke' drinks have the same color. * * * I have known of these other drinks on the market similar to Coca-Cola about ten years. Customers in asking for the different cola drinks ask for a 'dope,' or a 'shot,' or a 'sniff,' or different things. When they ask for those things I give them most any kind of a 'coke' drink we have on hand, I mean by 'coke' drink any that is put up in a black bottle,—'Koke,' 'Gay-Ola,' 'Nerve-Ola,' 'Coca-Cola,'—these cola drinks. I have customers come in and ask for 'coke;' I serve them just whatever we have on hand, if they do not specify. If they call for 'Koke,' whichever way you spell it, we give it to them; if we don't have it we tell them what we have. The same applies to 'dope.' In dispensing these drinks, we just set up a glass and a bottle to them so they can see the bottle. The name 'Coca-Cola' is on the 'Coca-Cola' bottle. Some of the others have names on the bottle and some don't. There is no way for our customers to know, when they come and ask for 'dope,' the drink they are getting without it is 'Coca-Cola;' 'Coca-Cola' uses their own bottles and these *other coke companies*, most of them use bottles they pick up,—almost all of them,—and you may get a case with a dozen different names on the bottles. The 'Coca-Cola' bottles have '*Coca-Cola*' on them. * * * When a customer comes into our establishment and asks for a 'coke,' I do not understand that he has made a definite and specific request on me for 'Coca-Cola' and nothing else." (Rec., 1060-61).

J. C. McDONALD, bar tender, Chattanooga, Tenn.:

"I handle soft drinks in my business. I have 'Coca-Cola,' 'Sinalco,' 'Poinsetta.' I did handle 'Coca-Cola,' but not since I have been in business for myself,—that has been six or eight weeks. I have got 'Koke' since I have ben in business here, when in business with other people we had 'Coca-Cola' for a while. We had 'Ala-Cola,' 'Maud Muller,' 'Tru-Cola.' (Rec., 1067-8). * * * I have customers come into our place of business and ask for 'dope.' When they ask for 'dope' I give them anything I have got in the line of a cola drink. I understand when they call for a 'dope,'—no particular brand, unless they call for the particular brand. I never had a customer refuse any of the other cola drinks we have dispensed, other than 'Coca-Cola,' when he asked for it as a 'dope,' on the ground that it was not what he asked for. * * * Customers do not come and ask for a cola drink by any other name besides those I have mentioned,—they say 'coke,' 'dope,' sometimes 'shot,' something like that. I understand they want *anything* in the *cola line*, and I give them what I have got. I do not consider the name 'coke,' or the name 'dope,' is a specific and definite name for 'Coca-Cola,' and no other drink." (Rec., 1068-9).

W. M. POLLOCK, Bottler, Nashville, Tenn.:

"We bottle 'John D. Fletcher's Coke and Cola' flavors. That is the only drink we bottle. The name of our concern is the Nashville Bottling Works. I have bottled other cola drinks. We bottled the 'Coca-Nola,' 'Rye-Ola,' 'Gay-Ola,' 'Mi-Ola,' 'Star-Cola,' and bottled other drinks, and I have had several samples of different drinks bottled at differ-

ent places. I have heard of, I guess, about 40 or 50,—something like that,—different cola drinks. (Rec., 1198-9). * * * I have heard 'coke' and 'dope,'—well, mighty near ever since I can remember a cola drink. I have heard 'coke' called more than I have 'dope.' These words, as applied to a soft drink,—I think they mean a cola drink. That is what I mean when I call for them. I go into a soda fountain and ask for a 'coke' or a 'dope' mighty near every day; I expect to get a cola drink. I do not expect *any particular* cola drink, because it don't make no difference just so I get a cola drink,— a *caffeine* drink. When I go in and ask for a 'coke' or a 'dope,' I do not consider that I am making *a* definite and specific request upon the soda dispenser for 'Coca-Cola' and nothing else. Just so he gives me a cola drink to quench my thirst is all I care about. I am not particular about what he gives me. The people, in ordering, call for 'cola,' and sometimes they use 'coke.' We have had written orders call it 'C-o-k-e.' * * * I have one at the house, I do not know, the secretary may have some more in his safe; I expect he has. * * * I do *not* regard 'coke' and 'dope' as meaning *any certain one*." (Rec., 1201-2).

LEE HAGAN, manufacturer of "Ko-Nut" and "Afri-Cola," Atlanta:

"Engaged in manufacturing syrups and soda water for about 27 years. I am now manufacturing just a general line, ginger ale, root beer, 'Lemo-Lime,' 'Ko-Nut,' 'Afri-Cola.' * * * I have known of cola drinks,—these caffeine drinks,—not counting Coca-Cola, for about 16 years. I got into the 'Afri-Cola' 16 years ago. * * * I have heard the words 'coke' and 'dope.' The first time I heard such

expressions was when I first became connected with the 'Afri-Cola' business. I heard that expression through our traveling man, Mr. Harris. We received an order from a customer of ours in Memphis, I believe it was, to ship a keg of 'dope.' I did not know what it was. I asked Mr. Ferris [Harris] about it, and he said that was a name they called the cola drinks in Memphis. * * * I had never heard the word 'dope' applied to soda fountain beverages before that time. There was a concern here in Atlanta once that used to put out a product under the name of 'Dope,'—the name of that concern was 'Dope Company.' I think they labeled their bottles 'Dope,' they advertised their product in Atlanta; I do not remember how extensively. It was a caffeine drink, one of these cola drinks. It was similar in color and taste to 'Coca-Cola.' This concern in Atlanta put out these goods under the name of 'Dope' 12 years ago, to the best of my recollection. (Rec., 1293-4) * * * I knew of the words 'coke' and 'dope' as applying to this class of beverages long before I ever heard of them [defendants' products]. * * * The first time I heard that word 'dope' was in 1899. * * * I *conceive* [concede] that the 'Coca-Cola' was the original 'cola' drink, 'coke' drink, or 'dope' drink, and their advertisements called attention to it." (Rec., 1298).

C. N. BAKER, a bottler for 16 years, at Newnan, Georgia:

"I have bottled 'Cola-Queen,' I called it, and 'Mi-Cola,' and 'Coca-Nola,' 'Rye-Ola,' and I don't know how many,—every drummer that come along I had to take at least a trial package. * * * The names the purchasers who want to buy a bottle of this stuff

use in asking for it,—some will call for a ‘cola,’ some for a ‘dope.’ I have sold many a one for ‘dope.’ I reckon I have sold a fourth of what I put up for ‘dope.’ (Rec., 1407). * * * If you come in and ask for a ‘dope,’ it don’t make any difference what you have, you give it to him,—I do, always did. I never had any one reject what I gave him on the ground it was not what he asked for.” (Rec., 1408).

R. W. LOCHRIE, a bar tender, Birmingham, Ala. :

“I tend bar at the Woodward. * * * I dispense soft drinks there, and cola drinks, also. We are handling at present ‘Nifti-Cola.’ Before we began handling ‘Nifti-Cola,’ we handled ‘Cola-Nip’ and ‘Coca-Cola.’ There is a label on this ‘Nifti-Cola’ bottle. * * * I think it is blown in the bottle, and there is a label on there,—a diamond shaped label, with ‘Nifti-Cola.’ It is a little yellow diamond shaped label on the side of the bottle. * * * Some customers call for ‘a cola,’—what they want,—others call for ‘a dope,’ they come in and say, ‘give me a bottle of dope.’ When they come in and say, ‘give me a bottle of dope,’ I give them what I handle, I give them ‘Nifti-Cola.’ If a man ordered a bottle of ‘dope,’ I would give him anything I had *that come under that head*,—*in that line of drink*. When I was handling ‘Coca-Cola’ and ‘Cola-Nip,’ when a customer came in and asked for a ‘dope,’ I gave him the first one I got hold of, unless he specified a certain one. When a customer comes in and asks for a ‘dope,’ I do not consider that he has made a definite and specific demand on me for ‘Coca-Cola’ I would take the word ‘dope’ myself to mean a drink that would come under the head of *cola* drinks, soft drinks in *that line*,—‘Coca-Cola,’ ‘Nifti-Cola,’ ‘Cola-

Nip,' 'Chero-Cola,'—anything,—that is my own idea on that. I have known of these cola drinks ten years, maybe longer,—I guess longer than that. * * * I have never had a customer reject any of the cola drinks I have dispensed when he asked for a 'dope' on the ground that it was not what he asked for, but I have when he asked for certain drinks and I told him the difference. I have had them come in and ask for certain drinks and told them that I did not have that drink, but tell them the drink I have and I have had them refuse to take that one. When I set a bottle of 'Nifti-Cola' up on the counter for a customer he ought to be able to tell that it is not 'Coca-Cola.' I could tell *by the label*." (Rec. 1339-1340).

H. O. ADAMS, retail grocery business, Adamsville, Ala.:

"I know J. C. Mayfield. I knowed him in 1903. * * * I was engaged in the retail business at Littleton, Alabama, selling groceries, fruits, meats and drinks. I bought some of Mr. Mayfield's products. I bought 'Celery-Cola' and the drink—the 'Koke.' * * * That was bottled goods I got. (Rec., 1343). * * * I am still in business. I have handled different products, something like those, 'Wise-Ola' and drinks made out here by the Pioneer Bottling Works, the same kind of stuff. They don't make nothing but 'Coca-Lulu.' * * * That was when I was at Littleton, I sold that stuff. * * * We used to handle 'Rye-Ola,' 'Wise-Ola,' and some other kinds of drinks, and after that I went into the bottling business, in 1907, to bottling. I was bottling up to the first of January. I shut down. There was no money in it then. We bottled what you call

'Queen-Ola' and 'Wise-Ola.' * * * 'Dope' applies to all these kinds of drinks." (Rec., 1344-5).

H. L. FISHER, wholesale liquor business, Birmingham, Ala.:

"My business takes me around the bars. * * * I frequently hear the names people use in asking for drinks around the bar. * * * The bars handle all these drinks sold here in the market,—'Rye-Ola,' 'Coca-Cola,' 'Ala-Cola,' and this 'Dope,' and I do not know, there seem to be eight or ten of them. I have known of these cola drinks, it seems to me like, always, but,—oh, well, I can't remember when there wasn't any. * * * I have heard people ask for a 'dope' and be served with 'Rye-Ola,' or these other drinks. I never heard anybody refuse those drinks as not what he asked for when he asked for it as 'dope.' These 'cola' drinks are all labeled,—most of them have the name on the cap. * * * I sometimes go in and ask for those drinks myself. I go in and say, 'give me a bottle of 'dope,' and I get anything that he gives me,—I am not expecting any certain thing. * * * From my experience, my hearing people ask for these different drinks, and what appears from observing the custom of the bars here in Birmingham, I do not consider that when a customer comes in and asks for a 'dope' that he has made a definite and specific request for 'Coca-Cola,' because there is so many of these drinks that a man will go in and ask for a 'dope' and take any one of them that is handed to him." (Rec., 1345-6-7).

G. G. DESOUCHE, bar tender, Metropolitan Hotel Bar, Birmingham, Ala.:

"We handle soda pop and something we call 'dope.' I lived in Louisville about nineteen or twenty years. * * * I have never handled, in the various places I have worded, any other cola drink but 'Coca-Cola,' and, in Louisville, 'Chero-Cola' and 'Coca.' Well, there has been a number of 'Colas,' with a little difference in the latter part of the name,—instead of making it 'Coca-Cola,' they make it 'Coca-*something*,' you know. I have known that 'Coca-Cola,' of course, first, a number of years ago,—I do not know just how long,—and then these other drinks came out later, and for a number of years I have handled a number of cola drinks. Customers in indicating to me the different cola drinks they want, some of them call for a 'dope' and some of them call for a 'Coca-Cola,' or soda pop,—but, of course, that is nothing like the *cola* drinks. When they come in and ask for a 'dope,' I give them 'Dope.' Before I commenced to handle 'Dope,' when they asked for 'dope' I gave them anything indiscriminately,—any of the other drinks I had there. I give them anything. In our business we consider them all 'dope,'—the whole business. (Rec., 1348-9). * * *

When a man comes in and asks me for a 'dope,' I give him 'Dope,' and if he asks me for 'Coca-Cola' I tell him I have not got 'Coca-Cola,' but I can give him some 'Dope.' Sometimes he says he don't want it, and sometimes he says, 'all right, give me that.' Customers ask for 'dope,' using the word 'dope.' I never have had them reject what I gave them on the ground that it was not what they asked for. At Louisville customers frequently came in and asked for 'dope.' I gave them something besides 'Coca-Cola,'—some of the other cola drinks. I done that for the reason of the price, that is all,—not on account of the goods,—that is 'Coca-Cola' costs 70

cents up there, and the other cost 50. If they came in and asked for a 'dope,' and I gave them some of the other drinks, I considered that I was giving them what they asked for." (Rec., 1350).

[S. M. TUCKER, bar tender, Birmingham, Ala.:

"We have the 'Dope,' 'Cola-Nip,' 'Nifti-Cola,' soda waters,—but the cola drinks, that would be just the 'Cola-Nip' and 'Nifti-Cola.' * * * We use another soft drink, named in the Birmingham business just 'Dope.' Customers indicate these cola drinks by asking for a 'dope,' and I give them a 'dope.' Sometimes they will ask for a 'cola' or a 'Coca-Cola,' and I tell them I have not got 'Coca-Cola,' but I will give you a 'Cold-Nip' or give a 'Nifti-Cola,' and they say, 'all right.' I always tell them we have not got 'Coca-Cola.' They will say give me a 'Nifti-Cola' or a 'Dope' or a 'Cola-Nip.' When customers come in and ask for a 'dope,' I do not consider they are making a definite and specific request on me for 'Coca-Cola.' Some people will not drink 'Coca-Cola.' " (Rec., 1353).

OMER REED, bar tender at Morris Hotel Bar, Birmingham, Ala.:

"We handle one cola drink made here in Birmingham, that 'Co?Co,' spelled 'Co?Co.' We have been handling that since I have been here. Sam Worcester makes that. 'Dope' is the only name we have for it. They come in and ask for 'dope.' When they ask for 'dope' I give them that 'Co?Co.' I never had any customers reject that 'Co?Co' when asked for 'dope' on the ground that it was not what they asked for. There is nothing on the bottle to indicate what is in there, only on the crown,— 'Co?Co' on the crown. When our customers come in

and ask me for a 'dope' I do not consider that they are making a definite and specific demand on me for 'Coca-Cola.' The word 'dope' means to me, as applied to a soft drink, any of those cola beverages, in my opinion. When a man calls for 'Coca-Cola,' I would give him 'Coca-Cola' if I had it; I would not give him 'dope.' We have people come in and ask for a 'Coca-Cola.' I tell them I have not got it. They will say, 'give me a "dope."'" (Rec., 1355).

E. D. MONTGOMERY, manager of the Eastern Division of the Southern Bell Telephone Co., Birmingham:

"I go into soda fountains now and ask for drinks of that kind. I sometimes use a word 'dope' in asking for these drinks. When I ask for a 'dope' I don't know what I expect to get. I get anything *in that line of* beverage, —'Chero-Cola,' 'Coca-Cola,' 'Koke,'—most any other drink that is put up in that beverage, because they handle so many different grades. * * * I do not consider, when I go in and ask for a 'dope,' that I am making a definite and specific demand for 'Coca-Cola.' (Rec., 1358). * * * I happened to be in one of the bars and asked for a 'Coca-Cola,' and they said, 'I have not got it, I can give you a 'dope.' I do not know how long ago that was, —approximately, say, two years." (Rec., 1361).

EDWARD J. OPLE, an employee of the Southern Bell Telephone Co., Birmingham:

"Cola drinks on the market are: 'Chero-Cola,' 'Coca-Cola,' and several different bottled drinks,—I am not familiar with the adopted name. I go into soda fountains and drink those drinks. I usually walk into a soda fountain, or saloon, and ask for a 'dope.' When I ask

for a 'dope' I expect to get most any of them. I mean by a 'dope,' several different bottled drinks, not a specific drink,—what the substance of it is I can not say. When I go into a soda fountain and ask for a 'dope,' I do not consider that I am asking the dispenser specifically and definitely to serve me with 'Coca-Cola.' * * * If I were served with 'Rye-Ola,' or 'Ala-Cola,' or anything of that sort, I would consider that I was getting what I asked for." (Rec., 1404-5).

WILLIAM DALTON, manager of the Health and Accident Insurance Co., New Orleans:

"I believe my personal information is that all that stuff goes under a common name of 'dope' or 'coke,'—all those drinks." (Rec., 1559-60).

2

Admissions of Plaintiff's Witnesses.

(a).—Those who admit that "Coke," "Dope," etc., mean any cola drink.

T. J. HAIZLIP, a retail druggist, Ft. Worth, Texas:

"You asked why I suppose people would apply the name 'dope' to one dope and not apply it to all the other dopes; well, I have an idea they apply it to all the other dopes. Yes, they put them all in the same class, if they know there is another dope. I know people who would come in and say—if they asked somebody to take a drink—'Do you drink Coca-Cola, or do you drink Koke?' Well, it's all dope, anyway—what's the difference? So go ahead, I will drink with you.'" (Rec., 1964).

J. M. PENLAND, a wholesale druggist, Waco, Texas:

"Yes, I am acquainted with the fact that there are various drinks on the market similar to 'Coca-Cola.' I know that there is. Yes sir, I class those drinks as dope, most of them. * * * I don't know that I would class all of them, because I don't know about them, but the ones I do know about I would class as dope, yes sir." (Rec., 1980).

J. W. HUGGINS, a "Coca-Cola" bottler, Murfreesboro, Tenn.:

"I do not know that I can give you the correct definition of the word 'dope' but I take it as meaning something like opium or morphine, something of that kind—that would be my idea about it. * * * Q. What does the word coke ordinarily mean to you? * * * A. Well, it carries with it very much the same meaning that I gave you for dope, to me, to my mind. * * * If it has any meaning it is more like a 'coke-fiend,' or a 'dope-fiend' or something like that. Oh, yes, I have heard of a 'coke-fiend.' Oh, yes, sir, I have heard of a person taking morphine or cocaine—anything like that—and referring to them as 'coke-fiends,' oh, yes, sir. Yes, I have understood that these cola drinks had some kind of drug in it of that kind, some kind of narcotic. Yes, sir, I have heard it said that they had cocaine in them." Rec., 2017-18).

S. B. CHRISTY, a "Coca-Cola" bottler, Murfreesboro, Tenn.:

"Yes, sr, I have heard of a person who used cocaine;

I have heard them referred to as a 'dope-fiend,' and I have also heard them called cocaine fiends. (Rec., 2301).

* * * Yes, sir, we called our drink [made from 'Nerve-Ola' syrup] 'coke' in 1902. All of us at the factory called it coke, and the men that worked at the factory, and the people in general,—our customers. 'The fact of the business is they call all of these drinks 'coke' at times. 'These cola drinks are generally known as 'cokes' and 'dopes.' ' (Rec., 2304).

JOHN H. BOHNE, a "Coca-Cola" jobber, St. Louis, Mo., and former manufacturer of "Orin-Cola.":

"We created a demand for our drink under the name of 'Orin-Cola.' I place that beverage in the class which I designate as cola drinks. It was known as 'dope' also." (Rec., 2046).

CLAUD W. HICKEL, formerly a dispenser of a number of dope drinks at Ocala, Florida, now of Charleston, W. Va.:

"A majority of the customers of the Anti-Monopoly Drug Store could tell the difference between the drinks that we were selling and 'Coca-Cola.' * * * 'The reason why I know that a majority of them could tell the difference between the drinks we sold and 'Coca-Cola' is because they would tell me so. We had some customers that came there every day or two to our place and they usually came to our fountain. 'The majority of our customers,—what I mean, regular customers,—don't ask for 'Coca-Cola'; they asked sometimes for 'dope' and sometimes 'coke,' but they knew they were not getting 'Coca-Cola.' Rec., 2066-7). * * * We called them 'dope,' 'coke'—whatever the customer asked for. Q.

What names did you use to classify those drinks? A. We generally called them 'dope.' " (Rec., 2065).

GEORGE L. SEIBERT, a soda dispenser, Mobile, Alabama:

"Any one taking cocaine, you call that 'dope,' and it means a drug on the order of cocaine, that's the only way I have heard of it, and a drink something *on the order of* 'Coca-Cola.' * * * You ask if there is any other drink I know of called 'dope'; well, only *on the order of* 'Coca-Cola.' Yes, sir, *any drink on the order of* 'Coca-Cola' is called 'coke' and dope." (Rec., 553).

JOHN W. GRAHAM, a soda dispenser, Mobile, Ala.:

"When I got experience, a man came in, asked for 'coke,' nine times out of ten he wants 'Coca-Cola.' "

What does he want the tenth time?

O. P. BLAND, a confectioner, New Orleans, La.:

"Now, I want to tell you, if I handled 'Koke' or any thing they call 'dope,' and I handled 'Coca-Cola'—I handled all three—and a man came in and ask for 'koke' I would give him 'Koke,' if he asked for 'dope' I would give him 'Dope,' if he asked for 'Coca-Cola' I would give him 'Coca-Cola,' but I handle only the one, and consequently I give him only that." (Rec., 670).

O. M. BROWN, a drug clerk, Oriental Drug Store, Dallas, Texas:

"About three weeks ago at the request of the 'Coca-

Cola' representative, Mr. Peace, I put on a test at the Oriental Drug Store, of our customers coming in. Q. Well, now what proportion of these people that called for 'coke' during the time that test continued, wanted 'Coca-Cola'—that called for 'coke'? A. Well, *half of them any way.*" (Rec., 764).

What did the *other half* want?

(b).—All the rest of plaintiff's witnesses admit they do not know, and are in no position to know, whether or not the slang expressions, "coke," "dope," etc., are used to indicate the maker of the article, or merely to describe its characteristics.

DAVE S. BAUER, a retail druggist, Mobile, Ala.:

"No, sir; you did not understand me to say that I carried no other soft drink but 'Coca-Cola'; I said no other *cola* drinks. Rec., 538). * * * No, sir; I don't know the names the public use in calling for these numerous cola beverages. (Rec., 542). * * * No, sir; I don't know the names by which the public asks for these drinks of that class. I don't know whether they ask for those drinks by the name of 'dope' and 'coke,' or not. No, sir; I don't know whether 'coke' and 'dope' are also nicknames for those drinks. (Rec., 543)."

G. H. UPCHURCH, a retail druggist, Mobile, Ala. (Rec., 525):

"No, sir; I have never handled any other beverages similar to 'Coca-Cola.' I have never handled

any other cola beverages except 'Coca-Cola.' No, sir; I have never seen any other cola beverages bought or sold. * * * No, sir; I don't know what names the public use in asking for these beverages. * * * I don't know whether the public calls for these beverages under the names of 'coke' or 'dope.' "

E. R. ALBRIGHT, a retail druggist, Mobile, Ala. (Rec., 550):

"No, sir; we don't handle any other drink now except 'Coca-Cola,' and so, of course, I don't know what the users of other drinks call their particular drink."

GEORGE L. SEIBERT, a soda dispenser, Mobile, Ala. (Rec., 554):

"No, sir; we don't handle any other cola drinks at our fountain except 'Coca-Cola.' I have never heard anybody ask for any other cola drinks than Coca-Cola."

ROBERT W. ELLIOTT, a soda dispenser, Mobile, Ala. (Rec., 565):

"Of course, we don't handle any other cola drinks. Yes, sir; I am entirely a 'Coca-Cola' man, and so is my establishment,—that is, we sell nothing on that order except 'Coca-Cola.' * * * Of course, I don't know what other people call their particular dope, or their particular drink, rather; I don't know whether they call for these drinks as 'coke' and 'dope,' or not; nor do I know whether or not 'dope' and 'cope'

are common names for cola beverages as a class.”
(Rec., 566).

I. D. WOOD, a retail druggist, Mobile, Ala. (Rec., 570-3):

“No, I have not handled any other cola drinks in my place,—nothing but the ‘Coca-Cola,’ and a stuff called ‘Dope’ and ‘Koke.’ No, sir; I don’t know what other people call their particular drinks. * * * No, sir; I don’t know what people would say when they call for them. * * * No, sir; I have never heard of any cola drinks on the market but the ‘Dope’ and ‘Koke’ products. I don’t know what names the trade calls for in the retail drug stores. I don’t know whether or not they call for these other cola drinks under the names of ‘dope’ and ‘coke.’ * * * I have been in the ‘Coca-Cola’ business all my life, and have handled nothing but ‘Coca-Cola’ except this product previously mentioned, and only a gallon of that. Of course, I don’t pretend to know the names the trade uses in calling for the other drinks of a similar character.”

J. M. PENLAND, a wholesale druggist, Waco, Tex.
(Rec., 1981-2):

“I don’t know the nicknames by which the public asks for other cola drinks. I don’t know whether they ask for those drinks by ‘dope,’ ‘shot in the arm,’ and these other names, or not. I have been a regular dealer in handling ‘Coca-Cola’ all the time, and, of course, not having handled or dealt in the other cola drinks, I haven’t paid any attention to the other people handling the other trade in the other drinks. I haven’t had an opportunity to observe

them. Not having dealt in any other drink similar to 'Coca-Cola,' I am, of course, not familiar with the customs and habits of the trade, and customers, and the names they use in asking for those different drinks in soda fountains. I am not familiar with the preparations to any extent."

T. J. HAZLIP, a retail druggist, Fort Worth, Tex.
(Rec., 1966):

"Well now, I don't know what nicknames the public commonly applies to other cola beverages at fountains where they are served, or what beverages they want when they ask for 'coke' and 'dope' at other fountains."

GEORGE S. MORSE, a retail druggist, New Orleans, La. (Rec., 647):

"No, sir; I have handled none of the other sort of drinks. * * * Of course, I don't know what the other soft drinks are, or what names the habitues call for them under."

CECIL V. RODGERS, a retail druggist, Dallas, Tex.
(Rec., 737-8):

"I have never seen any other similar drink to 'Coca-Cola.' * * * Yes, sir; my establishment is well known as keeping 'Coca-Cola.' It has always enjoyed that reputation, and my customers are 'Coca-Cola' customers. I have had them very often to make the remark that they would walk two or three blocks out of the way because they knew they were going to get genuine 'Coca-Cola.' Of course,

I cater t them, t keep regular habitues of 'Coca-Cola,'—try to keep a regular trade as regular habitues of 'Coca-Cola.' ”

JACOB SCHRODT, a retail druggist, Dallas, Tex.
(Rec., 742-4):

“Yes, sir; I mean by that I have handled no other similar drink,—nothing similar to 'Coca-Cola,'—and never have. My custom is built up as a 'Coca-Cola' custom in that particular line, and, of course, I try to keep it, and they so understand that I am catering to the 'Coca-Cola' taste and custom. * * * I know that drinks are served that are similar to 'Coca-Cola' at other fountains,— * * * I have drunk some of them,—I have no experience of my own knowledge to know what the run of the customers call for. We don't buy anything that looks like 'Coca-Cola' but 'Coca-Cola.' ”

CHARLES R. SMITH, a retail druggist, Dallas, Texas (Rec., 747):

“Yes, sir; my store is recognized as a 'Coca-Cola' store; I mean by that, that I handle 'Coca-Cola' to the exclusion of other similar drinks.”

J. W. ARRAÑT, a retail druggist, Dallas, Texas.
(Rec., 749):

“We have the reputation of being the largest dispenser of 'Coca-Cola' in Dallas, and we handle large quantities of it. We make that our specialty, and since we cater to it, we want that custom and we certainly do keep it. * * * Our customers, of course,

are 'Coca-Cola' customers; they come there because they know they can get 'Coca-Cola' there. * * * Everybody in Dallas knows they can't get anything but 'Coca-Cola' from me. No soft drinks similar to that are carried. * * * No cola drinks."

A. M. TIMMS, a retail druggist, Dallas, Texas (Rec., 754):

"I don't handle anything else except 'Coca-Cola.' I don't handle anything else of that class,—any rival drink, cola drink."

JAMES ROGERS, a retail druggist, Dallas, Texas. (Rec., 755-6):

"Yes, sir; I know from the financial side that I have a very large 'Coca-Cola' business. In our fountain we specialize on that to a certain extent. * * * No, sir; we haven't carried any other rival cola drinks,—those that claim to be in the same field as 'Coca-Cola'; we don't handle anything else."

S. Y. ALTHOFF, a soda dispenser, Dallas, Texas. (Rec., 763):

"We are not selling any drink of the same nature at the Owl Drug Company. We handle 'Coca-Cola' exclusively. * * * Yes, sir; our customers are 'Coca-Cola' customers. They come to us because they know we sell it. It is our boast, our brag that we dispense pure 'Coca-Cola,' and nothing but pure 'Coca-Cola.'"

O. M. BROWN, soda dispenser, Dallas, Texas (Rec., 764):

"No, sir; we don't handle any other rival drink of 'Coca-Cola,'—that is, any drink of the same general kind."

E. B. THOMAS, a retail druggist, (Rec., 771):

"No, sir; I carry no other drinks of the kind of 'Coca-Cola,' other than 'Coca-Cola.'"

C. D. KINGSTON, a retail druggist, (Rec., 792):

"I have handled 'Coca-Cola' altogether,—nothing but Coca-Cola."

F. L. SKILLER, a retail druggist, Dallas, Texas. (Rec., 795):

"I handle 'Coca-Cola' strictly, and don't handle anything else."

J. F. REDDING, a retail druggist, Atlanta, Ga. (Rec., 479):

"No, sir; I have never handled any other beverages similar to 'Coca-Cola' other than 'Coca-Cola.' * * * Why, no, sir; I don't know as I do know of any similar beverage to 'Coca-Cola' that is being sold in Atlanta. * * * I could not say they are on the market because I don't handle them. Probably they are, but I don't know that."

W. A. MEDLOCK, a retail druggist, Atlanta, Ga. (Rec., 483-4):

"I am a regular customer of the Coca-Cola Company. * * * You ask if I have ever seen any kegs

or barrels in which the other cola beverages on the market are shipped; we don't handle any other kind."

LINTON STEPHENS, a retail druggist, Atlanta Ga.
(Rec., 486):

"No, sir; I have never handled anything else but 'Coca-Cola' at my fountain. * * * I never did handle anything but 'Coca-Cola' at the fountains where I worked."

T. C. MARSHALL, a retail druggist, Atlanta, Ga.
(Rec., 495):

"Yes, sir; I have heard of other beverages similar to 'Coca-Cola' asked for at soda fountains,—but we never did sell them at all."

J. B. PENDTRGAST, a retail druggist, Atlanta, Ga.
(Rec., 497):

"We have no other similar beverage in our fountain but 'Coca-Cola.' No, sir; we haven't any other so-called cola or caffein containing beverage in our fountain."

E. EWER, a retail druggist, Dallas, Texas. (Rec., 808):

"No, I carry no other drink of that kind but 'Coca-Cola,' at my fountain."

W. H. RAMSEY, a retail druggist, Dallas, Texas.
(Rec., 820):

"No, sir; I don't serve any other drinks of that kind but 'Coca-Cola.' "

J. B. SMITH, a retail druggist, Dallas, Texas. (Rec., 825):

"We have never sold nothing but 'Coca-Cola.' "

T. J. BRITTON, a retail druggist, Dallas, Texas. 831):

"I have sold nothing but 'Coca-Cola' all my life."

EDWARD T. LANGAN, a lunch room proprietor, but formerly a soda dispenser, Chicago. (Rec., 894):

"For the last twelve years I should say I have sold 'Coca-Cola.' * * * I haven't dispensed any of this great number of cola drinks that are on the market." (Rec., 897).

F. M. GREEN, a retail druggist, Atlanta, Ga. (Rec., 454):

"No, sir; I have never handled any other drink at my soda fountain that tasted anything like 'Coca-Cola.' I have been a customer of the Coca-Cola Company of Atlanta, Ga., ever since I began to handle that stuff."

I. L. JAMES, a retail druggist, Atlanta, Ga. (Rec., 461):

"No, sir; I have never handled any other cola or caffein containing beverage except 'Coca-Cola.' "

ALEXANDER CRUICKSHANK, proprietor of a cigar store and soda fountain, Atlanta, Ga. Rec., 463):

“Yes, sir; we dispense ‘Coca-Cola.’ * * * The other drinks we serve at our fountain are lemon and lime, vanilla soda, orange-ade, chocolate, root beer, &c.”

J. D. T. LAWRENCE, a retail druggist, Atlanta, Ga. (Rec., 471):

“I never had anything else that was made for ‘Coca-Cola.’ ”

DAVID G. WISE, a retail druggist, Atlanta, Ga. (Rec., 476):

“No, I never handled any drink simiar to ‘Coca-Cola’ since I have been in business,—none of the so-called cola beverages or caffen containing beverages. Oh, yes, I have been quite a good steady customer of the Coca-Cola Company all the time, very much so,—we get a very nice *rebate* at the end of the year.”

JOHN NEHOS, proprietor of a soda fountain, Atlanta, Ga. (Rec., 512):

“Oh, no, I have never had any other drink of a tate and color similar to ‘Coca-Cola.’ ”

SCHEDULE XIII.

Defendants' Goods Have Not Been Passed Off As Plaintiff's Goods.

In Plaintiff's Schedule 6 under the caption "The product of the Koke Company has been systematically and habitually sold to the public as Coca-Cola," plaintiff cites only two witnesses whose testimony tends in the slightest degree to support the pretentious claim thus made, namely, D. P. English and B. W. Fuller, the former now an exclusive dealer in "Coca-Cola," and the latter now a soda dispenser in an exclusive "Coca-Cola" establishment.

There is no pretense that defendants had any sort of knowledge of the alleged circumstances these two parties relate, or that defendants are in any manner responsible for what they say occurred. •If their statements could be accepted as true and taken at their full face value, what they say would not sustain the extravagant claim that defendants' goods have been "'systematically and habitually sold to the public as 'Coca-Cola,'"—at best it would only go to show that in two isolated cases, wholly unknown to the defendants, a dishonest drug clerk in instance, and a dishonest soda jerker in another, served patrons of the fountains where they were employed with defendants' goods when "Coca-Cola" was asked for, and that in one case this practice continued only about a month before it was stopped by the management, while in the other it continued about two and a half months, when it was entirely discontinued. Of course, defendants could not be held responsible for that a dishonest drug clerk or soda jerker, or even a dishonest retail dealer, might do without their knowledge, consent of acquiescence, and without aid, suggestion or inducement

from them. *Coca-Cola Co. vs. Branham, et al*, 216 Fed., 264; *Mumm vs. Kirk*, 40 Fed., 589.

But as a matter of fact, the stories these two youngsters tell are of exceeding doubtful occurrence.

English says he was employed at the Palace Drug Company, Dallas, Texas, from May 1st to December 1st, 1913. (Rec., 803); that J. G. Pyle was manager only until July 15th, 1913, when Messrs. Florence & Nossick took over the business, and thereafter carried "Coca-Cola" exclusively. (Rec., 802). He says that during the two and a half months that Pyle was manager, from May 1st to July 15th, 1913, when people came into the store and asked for "Coca-Cola," the soda dispensers would serve them "Koke." (Rec. 802). He says that during that time the Palace Drug Company 'handled Koke, and I *think* they handled it exclusively. I don't *think* they handled any 'Coca-Cola.' I never heard of them buying any while I was there." (Rec., 802). He admits, however, that he was only the prescription clerk, (Rec., 803), and that, "of course, I did not buy the soda fountain syrups which they served, myself. I don't remember that I ever ordered any." (Rec., 807). He admits that he did not even bring up the syrups from the basement and put them in the fountain, but that the negro porter always did that, (Rec., 804), and that as a matter of fact "Koke" and "Coca-Cola" were so nearly alike that he could not tell, from looking at or tasting the syrup, whether it was "Koke" or "Coca-Cola" that was actually in the fountain. (Rec., 804). He admits that "the part of the store which I occupied was the prescription department," and that "the prescription department is in the rear of the store, and, as a rule, I am not visible while making prescriptions,—

I made them behind the counter. I had nothing to do with the soda fountain at all." (Rec., 803).

On the other hand, J. G. Pyle, the manager of the store, says, "I carried both 'Coca-Cola' and 'Koke,'" (Rec. 1722), and shows that during the two and a half months that he was manager in 1913, he purchased 600 gallons of "Coca-Cola." (Rec., 1723). He says that "Koke" was kept in one compartment in the fountain, and "Coca-Cola" in another, (Rec., 1722); that "Koke" was kept in the "simple syrup" jar, while "Coca-Cola" was kept in a jar labeled "Coca-Cola," (Rec. 1729); that he always kept two regular soda dispensers, (Rec., 1721), who had specific instructions to always serve "Coca-Cola" when it was asked for (Rec., 1722); and that "Koke" was never sold when "Coca-Cola" was asked for, to his knowledge. (Rec., 1723).

It is plain, therefore, that when English said it was "Koke" that was served on calls for "Coca-Cola," he was not stating a fact within his own knowledge, but an inference he had drawn from the erroneous assumption that the store had nothing but "Koke" in the fountain. He knew the dispensers were serving *something* when "Coca-Cola" was called for, and, being under the mistaken impression that they had *no* "Coca-Cola" to serve, jumped at the conclusion that they must be serving "Koke"; but, as the store did carry "Coca-Cola" as well as "Koke," and carried it for the express purpose of supplying the demand for "Coca-Cola," and as the dispensers were strictly enjoined to always serve "Coca-Cola" when it was asked for, it is highly probable that what they actually served to those who demanded "Coca-Cola" was, in fact, "Coca-Cola," and that English's assumption that it was "Koke" was due entirely to the un-

warranted inference drawn from the false premise that "he did not *think*" they had any "Coca-Cola."

On cross-examination English went a step further and said that he himself had served drinks at the fountain, and that he personally had sold "Koke" for "Coca-Cola." Thus:

"I mean to say that I sold 'Koke' for 'Coca-Cola.' * * * In the morning before the others got down I served a good many drinks. (Rec., 803). * * * You ask how often I served behind the counter,—I would open the store every other morning, and I would be there usually about twenty minutes before any of the other clerks got down, and people would call in and ask for 'Coca-Cola' and I would serve them." (Rec., 804).

But, as he was under the mistaken impression that there was no "Coca-Cola" in the fountain, and that it was all just "Koke," it is obvious that he might have been, and probably was, actually serving "Coca-Cola" without knowing it. He admits that he invariably drew the syrup for the drinks he served from the jar labeled "Coca-Cola," (Rec., 804) which was the jar containing the "Coca-Cola." (Rec., 1729).

He admits that the manager, J. G. Pyle, did not open the store in the morning (Rec., 804), and that "I couldn't say that I reported to my bosses that I was serving 'Koke' as 'Coca-Cola.' (Rec., 805) * * * I never did go to Mr. Pyle and tell him about anything like that." (Rec., 806). He adds, however, that "there wasn't any occasion for me telling him I was palming it off, because he knew it,—he was buying it and knew what went in." (Rec., 805-6). But this was just another inference based upon the erroneous supposition that Pyle hadn't

bought any "Coca-Cola," and, consequently, must have known it was "Koke" and not "Coca-Cola" that was being served when "Coca-Cola" was asked for. As Pyle had bought "Coca-Cola," and 600 gallons of it at that, it is clear that English's inference was not justified.

Finally, English says that he personally served drinks from the fountain, not only early in the mornings before the other clerks got down, but at various times throughout the day, and that Pyle saw him serving drinks there day after day, and repeatedly saw him serving "Koke" for "Coca-Cola." (Rec., 806). He says:

"I never made any record of the times he has seen me behind there, but it has been a good many times." There were only "a very few days at a time when he did not see me behind the counter at some time during the day serving drinks. I have no doubt he saw me serving 'Koke' for 'Coca-Cola.' You ask if I am sure he did; yes, he saw me." (Rec., 806).

If it were true that English really did serve drinks at the fountain, and that Pyle saw him doing so, and saw him serving *something* to people who asked for "Coca-Cola," that wouldn't be any indication that Pyle had the slightest idea but what English was serving "Coca-Cola" on all such calls. Both "Koke" and "Coca-Cola" were in the fountain; the dispensers had very positive orders to always serve "Coca-Cola" when it was asked for; and Pyle would naturally have assumed that his orders were being obeyed. If he had observed the jar from which English invariably drew the syrup, he would have seen that it was the "Coca-Cola" jar, and would have known that what he was serving was indeed "Coca-Cola." English's statement that Pyle "saw him

serving 'Koke' for 'Coca-Cola,' " is nothing more than an unfounded assumption. English "thought" there wasn't any "Coca-Cola" in the fountain; he "thought" the jar labeled "Coca-Cola" contained only "Koke" (Rec., 804); and, consequently, he "thought" that what he was serving was "Koke," and that Pyle, who purchased all the soda fountain syrups, must have known it; when, as a matter of fact, "Coca-Cola" and "Koke" were both in the fountain, in separate containers,—the "Koke" in the "Simple Syrup" jar and the "Coca-Cola" in the jar labeled "Coca-Cola" from which English drew the syrup for the drinks he made,—and, whether he knew it or not, what English was serving all the time was "Coca-Cola."

But the truth is, as English at first swore, that he was only the prescription clerk, that he occupied the prescription department at the rear of the store where he could not see what was going on at the fountain, and that he did not serve any drinks at the fountain and had nothing to do with the fountain department at all. (Rec., 803).

J. G. PYLE:

"We did business in Dallas, Texas, under the name of the Palace Drug Co. At that time we had in our employ D. P. English * * * He is a prescription man. I never saw him dispense any,—if he did it was while I was out. He never did any of it. I always kept a couple of soda men, and, if he ever dispensed any, I did not know it. (Rec., 1720-1) * * * I do not suppose he ever drew a drink, unless he did it for himself,—sometimes those fellows will draw their own drinks,—but I never did know him to sell a drink of any kind.

* * * It was not his business to do it. (Rec., 1722-3). * * * I gave the dispensers instructions with reference to the sale of 'Koke' and 'Coca-Cola.' I had *several*]*separate*[compartments to keep it in, and I told them if they called for 'Coca-Cola' to give 'Coca-Cola,' and if they called for 'Koke' to give them 'Koke.' I never told any of our dispensers to substitute 'Koke' when 'Coca-Cola' was asked for. I never told D. P. English to substitute 'Koke' when 'Coca-Cola' was asked for. I never thought he had anything to do with the 'Coca-Cola' business. * * * None of our dispensers, or D. P. English, or any one else connected with our establishment during the time we were handling 'Koke,' ever sold 'Koke' when 'Coca-Cola' was asked for, to my knowledge. I never heard that they had done so. I always instructed them not to do it. If they did it, it was against my instructions. (Rec., 1723). * * * Of course, I could not stand there and watch them and see what they were serving. I took it they would do what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. (Rec., 1728). * * * It would not be difficult for a soda man to know what he was serving. (Rec., 1727-8). * * * They could mistake one for the other, if they had been side by side and no labels on them,—they could have gotten them mixed up,—but we were very careful not to get one in the other; there was no reason to do so." (Rec., 1728).

The alleged substitution of "Koke" for "Coca-Cola" was evidently an after-though with English. He said that, when he was called on by plaintiff's representative for the purpose of securing him as a witness, "I

did not tell him this story about *substituting* 'Koke' for 'Coca-Cola.' * * * I did, however, tell them that I was *serving* 'Koke' *instead* of Coca-Cola.'" (Rec., 806-7).

The other witness plaintiff has produced to prove that defendants' goods are "systematically and habitually sold to the public as 'Coca-Cola,' is B. W. Fuller, who says: (Rec., 833-4).

"The Kirby Drug Co. at one time dispensed 'Koke' over its counter. They carried it exclusively the last month or so while I was there. * * * You ask if they sold it as 'Koke' or as 'Coca-Cola'; they sold it as both. If a man came in and called for 'Coca-Cola,' they served him 'Koke,—they didn't have anything else to serve him, sometimes they told him what they were serving,—told him it was 'Koke' and sometimes they didn't,—supposed to tell him along towards the last, they were supposed to tell him it was 'Koke.' You say you are not trying to find out what they were supposed to do, but whether 'Koke' was sold by the Kirby Drug Co. as 'Koke' or as 'Coca-Cola'; as both,—first it was sold as 'Coca-Cola,' as long as it lasted, and then they sold it as 'Koke' *as long as it lasted*, and then they sold it as 'Koke.' It must have been about a month, I guess, that they sold it as 'Coca-Cola.' (Rec., 834). * * * You ask if my boss did not tell me to tell customers that we were serving 'Koke'; that's along towards the last part, he told me to tell them I was selling 'Koke.' (Rec., 835). * * * Towards the last I sold it as 'Koke' to them, I did not pretend it was 'Coca-Cola.' When I left the company, my last service there, I was serving 'Koke' pure and simple to my customers, and they knew it." (Rec., 836).

The witness is evidently confused. It seems that up to the last month or so the Kirby Drug Co. carried both "Coca-Cola" and "Koke," and, when he says, "first it was sold as 'Coca-Cola,' *as long as it lasted*, and then they sold it as 'Koke,'" what he evidently had in mind was that they sold what "Coca-Cola" they had left on hand as "Coca-Cola" as long as it lasted, and then, when it ran out, and they had nothing left but 'Koke,' they then told their customers that what they were serving was "Koke."

It is highly significant that Fuller, who was formerly one of the soda dispensers at the Palace Drug Co. (Rec., 833), was not even asked by plaintiff if "Koke" was ever substituted for "Coca-Cola" at that store. Evidently plaintiff preferred to prove the fact by a prescription clerk who admitted he had nothing whatever to do with the soda fountain department.

On pages 142 to 157 of plaintiff's schedules, plaintiff quotes some extracts from the cross-examination of twelve of defendants' witnesses, stating in the caption that these extracts "clearly show the deliberate, systematic passing off of the Koke Companies' product for 'Coca-Cola.'" This must be intended for a joke, because certainly none of these witnesses says he sells defendants' goods for plaintiff's. On the contrary, they all distinctly state that they always serve plaintiff's product when asked for "Coca-Cola," and that it is only when their customers ask for "coke," "dope," "shot-in-the-arm," or some such expression that indicates merely the *kind* of drink desired without giving any information as to what, if any, brand is preferred, that they ever serve defendants' product. These witnesses do state, of course, defendants' product costs them less than plaintiff's, that they are in business to make money, and

that they naturally like to handle defendants' good because they can make a larger margin of profit on them, and that, therefore, they prefer to sell defendants' goods, and nearly always do sell them, when customers do not mention the brand of cola drink they prefer but just ask generally for that kind of drink. This, however, is in no sense a sale of defendants' goods and plaintiff's goods. It is nothing more than sound business policy.

On page 157 of plaintiff's schedules in this statement: "In the following instances bottled 'Koke' was passed off without comment in response to requests for 'Coca-Cola,'" and on the next page is a tabulation of the testimony of four of plaintiff's detectives, Hogan, Bogner, Gillon and Wilkins, showing the names and addresses of the dealers in bottled goods from whom they purchased some 35 or 40 bottles of "Koke," together with the dates of the purchases and the pages of the record where the testimony relative thereto may be found.

Plaintiff must have been hard pressed, indeed, for evidence of "fraudulent substitutions" when it had to bolster up its case with testimony of this sort. Not one of these detectives was deceived in the slightest by what he got. Each one of them knew, as soon as he saw the bottle, that it was "Koke" that was being handed out to him, and not "Coca-Cola," and it is plain, from an inspection of the bottles themselves, that anybody would have known so, too.

Clarence J. Hogan and B. J. Gillon, two Pinkerton detectives (Rec., 648, 659) made their purchases together. All told, they found four saloons out of twenty they visited that handed them bottles of "Koke" when they asked for "Coca-Cola." (660). Plaintiff's exhibit

113 to 122, inclusive, represent the bottles they purchased.

CLARENCE J. HOGAN: (Rec., 649):

"We have produced all the 'Koke' that was offered us for 'Coca-Cola.' * * * These purchases here are the only ones as to which we got results. * * * You say you take it for granted we were not deceived when we got it; why sure not. * * * Sure we know what it was when we got it. * * * There were places where we asked for 'Coca-Cola' and they didn't have it, but told us they had nothing but 'Koke.' In such instances as that we didn't take anything, but walked out of the man's place. I haven't the slightest idea how many places of that kind we went into, unless I would refer to my notes, * * * but we did go to a great many places where they told us they had no 'Coca-Cola' and offered us 'Koke.'" Rec., 649-50).

B. J. GILLON, (Rec., 661-2):

"In each place we went into, we called first for a glass of 'Coca-Cola,' and they served us out of the bottle,—they poured it out of the bottle into the glass,—and we drank from the glass. They gave us a drink, which we drank in each instance. When we drank the drink, we asked for a bottle of that drink under some circumstances, and under other circumstances we didn't ask for it. In each instance I saw the drink which was served to us in the bottle which it was served, and, in those cases where we got a drink in a glass, I knew what the bottle contained before I drank the stuff, so that I was not deceived at any time by what I drank. In each in-

stance where I ordered a drink and got it in a glass, and followed it up by an order of a bottle, in each such instance I saw it was a bottle of 'Koke' that had been served to me in the glass before I ordered it; and in each instance where I failed to order a bottle to take away with me, I was satisfied it was 'Coca Cola.' "

FRANK J. BOGNER, Rec., 652-3):

"Mr. Condon and myself went into a bar-room, called for a glass of 'Coca-Cola,' and they took out a bottle of 'Koke,' poured it in a glass, and we drank a part of it; then we asked them to sell us a bottle to take with us,—a bottle of 'Coca-Cola,'—and they wrapped up a bottle of 'Koke.' * * * We kept that up, I suppose, two or three weeks. Yes, sir, that's all we got. * * * Some places told us they had 'Koke' and didn't have 'Coca-Cola,'—a great many places told us that,—and, when they offered us 'Koke,' why then we didn't buy it. * * * Yes, sir, we have produced all the 'Koke' we got in our search. We were employed to get that stuff if we could; we went out to see if they would sell us 'Koke' for 'Coca-Cola.' * * * We went to see if we would get a substitute for 'Coca-Cola,' and, when we got it, we got what we were searching for,—got the evidence against him. Of course, when those fellows gave us a bottle wrapped up, we knew we had them." (Rec., 653).

GEORGE H. WILKINS (Rec., 886):

"You ask if I didn't know these bottles were not 'Coca-Cola' as soon as I looked at the bottles; in one case they were wrapped up. Of course, I could not

tell what they were when they were wrapped up, but as soon as I opened the bundle and saw the bottles, I knew that they were not 'Coca-Cola.'

The mere offering, or selling, of one product to a purchaser when another is asked for does not by any means necessarily constitute unfair competition, nor does it necessarily amount to a sale of the one product "as and for" the other. It is only when *deception* is practiced,—when the purchaser is deceived and thinks he is purchasing and receiving goods of one manufacturer when in he is receiving goods of another manufacturer,—or when there is a reasonable probability of deception, that unfair competition exists. When a purchaser asks for goods of one manufacture, and the vendor presents him, instead, with goods of another manufacture, put up in a package so readily distinguished from the packages in which the goods asked for are usually marketed that the purchaser either knows, or in the exercise of ordinary care ought to know, that the goods he has received are not what he has asked for, then no unlawful substitution or unfair competition has been practiced, but, as said by the Circuit Court of Appeals for the Eighth Circuit in *Walter Baker & Co. vs. Gray*, 192 Fed., 926, the transaction amounts to—

"a proposition to the purchaser to accept that [the goods offered to him] in lieu of what he asked for."

As said by Mr. Justice Clifford in *McLean vs. Fleming*, 96 U. S., 245, (24 L. Ed., 828):

"A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate one from the other."

And as said by Mr. Justice Jackson in *Columbia Mill Vo. vs. Alcorn*, 150 U. S. 464 (37 L. Ed., 1144):

“Even in the case of a valid trade-mark, the similarity of brands must be such as to mislead the ordinary purchaser.”

If the mere offering or selling of goods of one manufacturer to a purchaser who has asked for the goods of another manufacturer, in and of itself constitutes unlawful substitution, or unfair competition, notwithstanding the fact that the respective packages are so readily distinguished from each other that ordinary purchasers using ordinary care to ascertain what they are getting could readily detect an attempted substitution, then it would be unlawful substitution and unfair competition to hand a purchaser who had asked for “Coca-Cola,” a package of “Lydia E. Pinkham’s Vegetable Compound,” or of “Dr. Bell’s Pine Tar Honey,” or a bottle of “Mrs. Winslow’s Soothing Syrup,” or of “Wine of Cardui,” “Iron Brew,” “Moxie,” Sarsaparilla, Root Beer, Jersey Cream or Peruna. A purchaser who was so careless and indifferent as to what he was getting as to accept any of these things for “Coca-Cola,” would no doubt as readily accept an apple for an orange, a cucumber for a watermelon, or a pumgranite for a prune. Such purchasers the law does not protect, nor will it give one manufacturer rather than another a monopoly of their trade by doing more than requiring each manufacturer to so name and dress his product that an ordinary purchaser, exercising ordinary care to ascertain the source of its manufacture, can readily learn that fact by a reasonable examination of its packages. *Coats vs. Merrick Thread Co.*, 140 U. S., 562, 172 Fed., 926; *Centaur vs. Marshall*, 97 Fed 785; *Allen B. Wrisley Co. vs. Iowa Soap Co.*, 122 Fed., 796, (37 L. Ed. 847); *Coca-Cola Co. vs. Glee-Nol Bottling Co.*, 221 Fed., 61.

SCHEDULE XIV.

Defendants' Salesmen Have Not Aided, Encouraged, or Induced Retail Dealers to Sell Defendants' Goods As the Goods Of Plaintiff.

Plaintiff called a number of witnesses in an effort to prove that defendants' salesmen had endeavored to induce them to sell defendants' product as and for plaintiff's product, but instead of proving what they had been summoned to prove, they proved the exact reverse. For instance:

E. R. ALBRIGHT, of Albright & Wood, retail druggists, Mobile, Ala. (Rec., 546):

"He wanted to sell a syrup called 'Dope.' * * * He said it was to be supplied when people asked for 'dope,' and that they had the name 'Dope' copyrighted, &c., and that I had just as much right to give a man 'Dope' when he asked for 'dope' as I did to give him Coca-Cola when he asked for 'Coca-Cola,' and he based his argument on these facts,—*he didn't try to sell it as a substitute for Coca-Cola.*"

I. V. WOOD, of the firm of Albright & Wood, Mobile, Ala. (Rec., 566):

"The representative of the Koke Company *did not ask me to come out and substitute this product for 'Coca-Cola.'*"

PIERRE AUGUSTE CAPDAU, retail druggist,

New Orleans, La., (Rec., 644), tells a long story about some man he had never seen before and whom he has never seen since, whose name he didn't get, and the only thing about whom he can remember is that he had a black mustache. (Rec., 666).

No one in the employ of defendants ever had a black mustache. (Rec. 1513; 1573). The only person in this record with a black mustache is plaintiff's chief detective, H. B. Pierce. |

GEORGE C. KERSHAW, a retail druggist, Dallas, Texas, (Rec., 811), tells about the representations made to him by a salesman of some concern in no way connected with the defendants. The man who called on him was a representative of the *Coke Company*, of *Pine Bluff, Arkansas*, (Rec., 811), one of defendants' *competitors*.

This is the fourth time plaintiff has quoted this testimony as evidence against defendants. When the attention of plaintiff's counsel was first called to the fact that Kershaw's story concerned a salesman of the *Pine Bluff* company and not of the defendants, plaintiff's counsel readily admitted their mistake in quoting from this testimony. But when the case came up in the Patent Office the mistake was repeated, and it was repeated when the case was tried at New Orleans, and is again repeated here. The only possible inference is that plaintiff is so hard up for evidence to sustain the pretentious title to its schedule five, that it just had to put this quotation in, in order to have something besides the title.

CECIL V. ROGERS, a retail druggist, Dallas, Texas, says:

"I had a call from a salesman representing the Koke Company of Texas, in reference to 'Koke.' The salesman wanted to put in 'Koke' to be served at the fountain. While he didn't exactly make representations to the effect that it could be served for 'Coca-Cola,' he made mention of the fact that when people called for 'coke' give them 'Koke'; and when they called for 'coke,' they were more than likely to mean they wanted 'Koke' than 'Coca-Cola.'"

CHARLES R. SMITH, a retail druggist, Dallas, Texas. (Rec., 746):

"They said if people came in and asked for 'Koke,' just to give it to them."

T. Q. MARTIN, proprietor of the Owl Drug Store, Dallas, Texas. (Rec., 765):

"He came and asked me to sell 'Koke,' and said it was *just as good as* 'Coca-Cola,' from the fact that it was being manufactured at Dallas, and as a patriotic citizen I should sell it, and that I would not be deceiving the customers, because a man should get what he called for,—if he called for 'Koke' that we should have the 'Koke' to give him."

E. B. THOMAS, a confectioner, Dallas, Texas. (Rec., 766):

"You ask if anything was said as to whether or not my customers would be able to tell the difference; well, I don't know exactly on that, but my best recollection on that is that there would be no one that would make any kick on it at all if they called

for 'coke' and we gave them 'Koke,'—there would be no kick on it; that it was a *first-class article*, and that we could sell it *as good as we could 'Coca-Cola.'* ”

It is true that Robert Chidsey, a soda dispenser, Mobile, Ala., (Rec., 558), says that one of defendants' salesmen endeavored to get him to sell "Koke" for "Coca-Cola." On cross-examination, however, he said (Rec., 561):

“Yes, sir; I am sure he used the words *in the place of 'Coca-Cola'* and not *'as a substitute for 'Coca-Cola.'* ”

It is plain that this witness did not appreciate the distinction between a proposition to sell "Koke" when "coke" and "dope" were called for, and a proposition to sell "Koke" when "Coca-Cola" was asked for.

This illustrated by Dave S. Bauer, (Rec., 537):

“You ask if anything was said about substituting “Koke’ for ‘Coca-Cola’; that was one of the first things that he told me, that I could sell ‘Koke’ and ‘Dope,’ and that the calls for ‘Coca-Cola,’ the public wouldn’t know it, and couldn’t tell the difference.

* * * That is pretty much what he said, I think, after first trying to induce me to buy his syrup, as I understood it, as a *substitute* for ‘Coca-Cola.’

* * * I said, ‘Well, I am going to see that they do not serve it.’ He says, ‘How are you going to do that?’ Then I showed him a sign on the fountain that said, ‘If you want ‘Coca-Cola,’ please call for it by its correct name; that is the only cola drink we serve at this fountain.’ Then, in addition to that, that when a customer *calls for ‘Coca-Cola,’*—

that is, when they call for '*coke*' or '*dope*,'—to tell them they want '*Coca-Cola*.' ”

Bauer makes it plain that the salesman evidently told him that he could sell “Koke” when “coke” and “dope” were asked for, and he construed that as a proposition to sell “Koke” when “Coca-Cola” was asked for; and, in giving his testimony months later, in endeavoring to repeat what the salesman had said, he used his *own* language and not that of the salesman, and substituted the words “*Coca-Cola*” for what the salesman had said,—“*coke*” and “*dope*.” And that is evidently how Robert Chidsey came to make the statement that the defendants’ salesman told him he could sell defendants’ products as and for plaintiff’s, because all the other witnesses agree that defendants’ salesmen not only were not endeavoring to get dealers to pass off other goods for plaintiff’s goods, but were denouncing substitution as a fraud and an evil, and urging dealers not to substitute “Coca-Cola” when “Koke” and “Dope” were asked for. It does not seem reasonable that a salesman would in one breath denounce as a fraud what he was about to ask the dealer to do in the next breath.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT 2

No. 3012

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants-Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,
Plaintiff-Appellee.

} Appeal from the United
States District Court
for the District of
Arizona.

BRIEF ON BEHALF OF THE COCA-COLA COMPANY,
PLAINTIFF-APPELLEE.

WILLIAM K. WHITE,
Solicitor for Plaintiff-Appellee.

HAROLD HIRSCH,
FRANK F. REED,
EDWARD S. ROGERS,
Of Counsel.

FILED



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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

No. 3012

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants-Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,
Plaintiff-Appellee.

Appeal from the United
States District Court
for the District of
Arizona.

BRIEF AND ARGUMENT FOR APPELLEE.

I.

Statement of the Case.

This is an appeal from an interlocutory order entered after hearing on pleading and proofs enjoining the defendants below, appellants here, from trade-mark infringement and unfair and fraudulent trade practices in the manufacture and sale of soft drinks arising out of the following facts:

The Coca-Cola Company is the manufacturer and seller of the well known and widely advertised beverage, Coca-Cola, and is a Georgia corporation, organized in 1892. It is successor to the trade rights of various in-

dividuals and copartnerships with respect to this product. The Coca-Cola Company's chain of title is complete and is evidenced by documents, reproductions of which are in the record. An abstract with appropriate references to the testimony will be found in Schedule I. Indeed, The Coca-Cola Company's title to the business of manufacturing and selling Coca-Cola and its ownership of the trade rights therein are not disputed.

Coca-Cola has acquired certain familiarly used nicknames. Those involved in the present case are the words "Koke," into which the name Coca-Cola is commonly abbreviated by the public, and "Dope," which is a nickname for Coca-Cola in certain sections of the country.

The acts of infringement and unfair trade complained of are the sale by the Koke Companies of a product not Coca-Cola under the names Koke and Dope, the abbreviation and nickname, respectively, by which Coca-Cola is known to the public. The Koke Companies' product whether sold under the name Koke or Dope is the same thing. They use two names for the same article because Coca-Cola is known in some places as "Koke" and in others as "Dope." In this way they are enabled to take every advantage of whatever Coca-Cola nickname may be in use in any locality. The Koke Companies have also imitated the Coca-Cola bottle labels under which bottled Coca-Cola is sold to the public. They also duplicate the red barrels in which Coca-Cola syrup is invariably shipped, and they unnecessarily simulate the distinctive coloring of the product itself. All of these are correlative acts of unfair competition and are efficient aids in the fraudulent scheme of pirating The Coca-Cola Company's good will and business.

The Koke Companies' intentional false representation to the public, effectuated by the sale of their product un-

der the names Koke and Dope, thus placing an instrument of fraud in the hands of dealers, is made plain by the express representation of their agents and salesmen to dealers that Koke and Dope can be sold as and for Coca-Cola and the suggestion that this be done. The inevitable result has followed and the Koke Companies' goods are in fact sold as and for Coca-Cola and the public is thus deceived and The Coca-Cola Company is injured. It is not necessary to indulge in any speculation concerning the motives behind the Koke Companies' conduct. It is plain from the record in this case that their scheme is a deliberately fraudulent one, piratical in its inception and dishonest in its operation.

As a means of carrying out the deception involved in the use of the Coca-Cola nicknames Koke and Dope and as a device to impress their customers and give a legal aspect to the fraud, J. C. Mayfield, who is the alleged predecessor in title of the various Koke Companies and an officer of several of them, purchased certain trade-mark registrations in the United States Patent Office of the words Koke and Dope.

The Murfreesboro Bottling Works of Murfreesboro, Tenn., on August 21, 1906, registered as a trade-mark for beverages the word Koke. The certificate is number 55,878.

Houppert & Worcester, of Birmingham, Ala., on June 4, 1907, secured a registration in the Patent Office of the word Dope. The certificate is number 63,033.

In 1898 W. L. Bitting, of Sherman, Texas, secured a label registration showing the word "Koke" claimed to be applied to a chemical compound, and Bitting, on August 21, 1911, applied for a trade-mark registration of the word Koke for a beverage.

These registrations were purchased by J. C. Mayfield, and later were assigned by him to the Koke Company of

America, which company has attempted to license the other Koke Companies, to use these words.

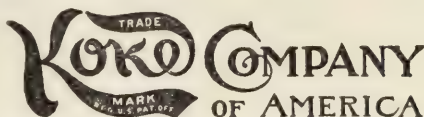
These purchases were made prior to the issuance of the last registration to W. L. Bitting, above named, and the certificate, number 94,869, was issued on January 13, 1914, to the Koke Company of America as Bitting's assignee.

It appears from the testimony in this case that the applicants for registration in each instance applied with knowledge that the words Koke and Dope were commonly used nicknames for Coca-Cola and these registrations were purchased by Mayfield as a part of his scheme to pirate upon The Coca-Cola Company's trade rights, and for the purpose of justifying and apparently legalizing the sale of the Koke Companies' product to the public in response to requests for Koke and Dope, which requests, of course, were definite demands for Coca-Cola, so intended by the purchaser and so understood by the seller.

These registrations form an important element in the Koke Companies' plan of unfair trading. One of their cards is here illustrated:



REG. U.S. PAT. OFF.
DEC. 27, 1898 N° 6752
AUG. 21, 1906 N° 55,878



UNITED STATES, MEXICO, CUBA AND CANADA.
SUBSIDIARY OFFICES
CHICAGO, ST LOUIS, CHATTANOOGA, DALLAS, LOS ANGELES,
NEW ORLEANS, WASHINGTON AND NEW YORK.



REG. U.S. PAT. OFF.
JUNE 1, 1907, N° 63,033
Koke & Dope
ARE NON-ALCOHOLIC AND HAVE
NO HARMFUL EFFECT.

NOTICE !

Our customers will please notify US, or the INDUSTRIAL SURETY CO. of NEW YORK of any infringements on our trade-marks "KOKE" or "DOPE," or of any one substituting any other beverage on calls for "KOKE" or "DOPE." This is a violation of the Federal laws, and we will prosecute any and all persons who thus infringe upon our rights, to the fullest extent of the law.

KOKE COMPANY OF AMERICA
J. C. MAYFIELD, President

PRESENTED BY

J. W. MAYFIELD

REPRESENTING THE NEW ORLEANS OFFICE

[OVER]

Similar warnings and threats appear in the Koke Companies advertisements in trade papers to dealers. For example, there appears in an advertisement in the Southern Carbonator and Bottler the statement, "Keep Your Conscience Clear. We have the sole right to sell 'Koke' or 'Dope' and are protected in the use of these names by United States trade-mark registrations as shown above." (Rec., 1686.)

Mayfield describes the Koke Companies' products as "the legalized drink." (Rec., 1687.)

Thus it will be seen that a product which sells to the trade for less than Coca-Cola (Rec., 1687), and is sold to the consumer at the same price and under nicknames always applied to Coca-Cola and as a "legalized drink," substitution for Coca-Cola is not only suggested and invited, but is announced to be legitimate, legally unassailable and licensed, indeed compelled under penalty, by the Federal Government.

The court below found as facts from the evidence that the words Koke and Dope are each an abbreviation of Coca-Cola and are used by the public and by purchasers in designating Coca-Cola. That these words were adopted and used by the Koke Companies and Mayfield with the deliberate purpose of representing their goods to be the product and manufacture of The Coca-Cola Company and that the Koke Companies' salesmen were instructed to sell and did sell Koke and Dope as and for Coca-Cola.

Judge Sawtelle in his opinion said (235 Fed., 408):

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for

that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff.

* * * * *

I am convinced that when the witness Mayfield adopted the name 'Koke,' he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company. I further find that the purchase of the trademark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

* * * * *

The witness Wright of the Southern Koke Company justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, 'Coca-Cola.' "

One of the labels used by the Koke Companies, which the court below finds and their promoter (Moore) admits was copied from the Coca-Cola label, is here paralleled with a Coca-Cola label each attached to a bottle and as seen by the public. (Rec., 22.)



The Pending Cases between the Parties, and the Decisions in Them.

This is one of five cases arising out of the trade situation just outlined, and in order to see the necessity for the various steps which have been taken, it is desirable at this point to trace the organization of the various Koke Companies, all of which are Arizona corporations.

In 1909, J. C. Mayfield, who claimed rights in the names Koke and Dope by reason of the purchase of the registrations just referred to, was a party to the organization of an Arizona corporation, The Koke Company of America, to which he conveyed certain pretended rights relating to the manufacture and sale of the product and the use of the names. The Koke Company of America by contracts licensed other corporations organized under the laws of Arizona to carry on the sale in certain localities; The Koke Company of Texas, in the State of Texas; The Koke Company of Oklahoma in that State; The Koke Company of Arkansas in the State of Arkansas, and the Southern Koke Company, Ltd., in certain southern territory, including the State of Louisiana.

In point of time (December 26, 1913), the first proceeding to be instituted was an opposition filed in the Patent Office at Washington by The Coca-Cola Company against the attempted registration under the Act of February 20, 1905, by The Koke Company of America of the word Koke as a trade-mark.

The following other suits were brought by The Coca-Cola Company:

This proceeding in the United States District Court, for the District of Arizona, against The Koke Company of America, Southern Koke Company, Limited, Koke Company of Texas, Koke Company of Oklahoma and the Koke Company of Arkansas.

In the United States District Court for the Eastern District of Louisiana, Northern Division, against Southern Koke Company, Limited, James L. Wright and J. C. Mayfield, its officers, and a bottler who was bottling Koke under the counterfeit labels. Mayfield is the alleged predecessor in title of all the Koke Companies.

In the United States District Court, for the Northern District of Texas, Dallas Division, against Koke Company of Texas, W. McCarty Moore and G. J. Van Winkle, who were president and secretary, respectively, of the company, E. M. Boyd, a director, and a bottler who was bottling Koke under the labels imitating the Coca-Cola labels.

In the United States District Court, for the Eastern District of Missouri, Eastern Division, against The Koke Company of America, J. C. Mayfield and J. H. Van Deusen. J. H. Van Deusen was the manufacturer of the syrup product for the Koke Companies.

By stipulation an order of court was entered in all the cases whereby the testimony was to be taken but once and filed in all.

Three of the cases have already been argued and decided. This one against the Arizona corporations, was decided by Judge Sawtelle, of the United States District Court for the District of Arizona, on July 7, 1916 (235 Fed., 408), and is here on appeal. The opinion and decree are printed as Appendices I and II to this brief on pages 141 and 153 respectively.

The case in the Louisiana District Court was argued at New Orleans in January, 1917, and decided on May 24, 1917. Judge Foster found all the issues in favor of The Coca-Cola Company and entered a decree enjoining the infringing and unfair practices complained of. This decree is printed as Appendix III to this brief (p. 156).

Injunction writs have been issued and served. No appeal has been taken from Judge Foster's order and the time for appeal has elapsed.

The Patent Office case was decided by the Examiner of Interferences on May 24, 1916. He held that the attempted registration of the word Koke by The Koke Company of America was an effort to appropriate a nickname for Coca-Cola, was a fraud, and refused the registration. The opinion of the Examiner of Interferences is printed at the close of this brief as Appendix IV (p. 159.) An appeal was taken by the Koke Company of America to the Commissioner of Patents who on August 14, 1917, affirmed the Examiner of Interferences. A copy of the Commissioner's opinion is printed as Appendix V of this brief p. 180).

The cases in the United States District Courts in Missouri and in Texas have not yet been argued.

It will thus be seen that this controversy on the same record, between parties identical or in privity has been passed upon by four different judges. The question is one of fact and all four judges have come to the same conclusions—that the Koke Companies were conceived in fraud and launched for the express purpose of pirating the business of The Coca-Cola Company, that their conduct is deliberately fraudulent, and that they are intentionally passing off their product as and for Coca-Cola to the damage and injury of The Coca-Cola Company and the deception of the public. Upon the record in this case it is difficult to see how any other conclusion could have been reached.

The Decisions of the Court Below of the District Court in Louisiana and of the Examiner of Interferences in the Patent Office and of the Commissioner of Patents Are Correct.

There can be no doubt of the correctness of the conclusions of Judge Sawtelle, Judge Foster and the Patent Office authorities in view of the record before them and now before this court.

That the word Koke is a common abbreviation of and the word Dope a familiar nickname for Coca-Cola, and have been for many years, is conclusively established by this record. That the word Koke is such an abbreviation and nickname was found as a fact by the Patent Office authorities and that both Koke and Dope are abbreviations and nicknames of Coca-Cola was found by Judge Sawtelle and Judge Foster. The Patent Office found:

“The opposer (The Coca-Cola Company) has introduced the testimony of numerous witnesses located in different sections of the country to the effect that customers at soda fountains who ask for Koke accept Coca-Cola without objection. In many instances such customers, when asked if they meant Coca-Cola, answered in the affirmative. Some of the witnesses testified that, to their recollection, ‘Koke’ had been used as a nickname for ‘Coca-Cola’ for as much as twenty or twenty-five years. No attempt will be made to make a detailed analysis of the mass of testimony which has been introduced to establish this point of opposer’s case. It is objected to by the applicant on the ground that it is the testimony of interested witnesses and to a certain extent that is true. Much of it is the testimony of detectives employed by the opposer and sent to different parts of the country for the express purpose of collecting evidence. Much of it is the testimony of customers of The Coca-Cola Company. Some of it must be entirely disregarded on the ground that it is mere hearsay. Some was properly objected to on the ground that it was given in response to leading questions.

A large proportion of this evidence, however, is free from objection, other than that it is the testimony of witnesses who, as customers or employes, are more or less interested in the success of the Coca-Cola Company as a commercial institution. No good reason has been shown why such evidence should not be accepted as true. It has been abstracted and tabulated, for convenient reference, on pages 137 to 171 of opposer's brief. It has not been satisfactorily rebutted and counsel for applicant do not contend that the word 'Koke' has not been so used.

* * * * *

It will therefore be regarded as an established fact, for the purpose of deciding this case, that the word 'Koke' has been used quite generally for many years in certain sections of the country, and particularly in Texas, as an abbreviation or nickname, intended to distinguish opposer's goods from goods of like descriptive properties."

Judge Sawtelle held:

"I find that both words (Koke and Dope) are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola."

Judge Foster found as a fact:

"That the words 'Koke' and 'Dope' are each an abbreviation of the word 'Coca-Cola' and are used by the public and purchasers in designating the plaintiff's product 'Coca-Cola.' "

That these conclusions are inevitable from the record here is shown by the quotations from the testimony in Schedule II.

There is no doubt that in many sections of the country the word Koke is the universal designation of Coca-Cola and that in other sections of the country the word Dope is equally a specific request for Coca-Cola, so that a request at any fountain for a drink under the name Koke or Dope is understood to be a definite and specific request for Coca-Cola, both by the buyer and seller. The

testimony is plain and Judge Sawtelle found that the defendants adopted the words Koke and Dope with full knowledge of this fact and for the sole purpose of enabling the sale of the defendants' product as and for Coca-Cola by the use of these familiar nicknames. Judge Sawtelle uses this language:

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendants, Koke Company of America and its predecessors, did not adopt or make use of the name 'Koke' until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff. *Parker v. Stebler*, 177 Fed., 210, 9th Circuit, *The Barbed Wire Patent*, 143 U. S., 275; *Deering v. Winona Harvester Works*, 155 U. S., 286.

I am convinced that when the witness Mayfield adopted the name 'Koke,' he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company.

I further find that the purchase of the trade-mark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

The witness Wright of the Southern Koke Com-

pany justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola."

The Commissioner of Patents said:

"In fact, it is not seen why anyone would wish to adopt such a trade-mark (Koke) unless it were to justify the retailer in selling his goods on the ground that they were called for when, in fact, the customer had no such thought in mind when asking for a Koke."

Judge Foster found,

"That the words Koke and Dope were adopted and used by the defendants with the deliberate purpose of representing their goods to be the product and manufacture of The Coca-Cola Company."

* * * * *

"That defendants' salesmen were instructed to sell and did sell defendants' product under the names 'Koke' and 'Dope' as and for Coca-Cola."

In view of the admissions and conduct of the officers and incorporators of the Koke Companies no other finding in this respect could be possible. The following appears from the testimony:

W. McCarty Moore, one of the incorporators and the promoter of the Koke Company of America, The Southern Koke Company, Ltd., and the Koke Company of Texas, and at one time an officer and director, testifies that the Koke Companies were organized for the sole purpose of competing with The Coca-Cola Company; that he knew that people asked for Coca-Cola as Koke years before the Koke Companies were organized, and

that he discussed with counsel their right to use the word Koke in view of its being a nickname for Coca-Cola; that he took a Coca-Cola label to a label maker as copy for the Koke labels and that he knows there is confusion between Koke and Coca-Cola.

When the cuts for the making of the Koke label, which Moore copied from the Coca-Cola label, were sent to the Southern Koke Company, Ltd., at New Orleans, there was a dispute about the color of the Coca-Cola label which was to be imitated; that Scott and Cheevers, vice president and salesman, respectively, of the Southern Koke Company, Ltd., went to a printer and could not agree upon the color of the Coca-Cola label, so they sent out and got a bottle of Coca-Cola with a label on it so that they could be sure of duplicating the color exactly.

The color of the paint used by the Koke Companies for barrels containing its product was matched from the Coca-Cola barrels. A paint maker was instructed by the officers of the Southern Koke Company, Ltd., to get a red as near the Coca-Cola red as possible, and old Coca-Cola barrels are habitually used as containers.

Stock was attempted to be sold on the representation that the product of the Koke Company could be passed off as and for Coca-Cola. The salesmen of the Koke Companies went about the country holding out as an inducement to dealers to purchase, that Koke could be passed off for Coca-Cola and the public will not know the difference, and that by reason of the cheaper price its sale was more profitable. These representations of the salesmen of the Koke Companies, the suggestions to dealers that Koke can be successfully palmed off as Coca-Cola are not denied. The salesmen who made them were named (*e. g.*, Patton, Boyd and others), and though still in the employ of the Koke Companies were not called by them as witnesses.

The natural and inevitable result has followed, that Koke and Dope is sold as and for Coca-Cola and the public is deceived. There is no dispute about these facts. Many of them are admitted by the officers of the Koke Companies. None is denied. Indeed, the positions assumed by the Koke Companies in these cases if carried out in practice (and the record shows that they are) necessitate the passing off Koke and Dope for Coca-Cola and further that such passing off is not only legitimate, but not to pass off is illegal. Their salesmen represent to prospective purchasers that Koke and Dope are the same as Coca-Cola; that they are made according to the same formula; that they are indistinguishable, and no one can tell them apart; that under the registrations which Mayfield has the Koke Companies are entitled, under the laws of the United States, to the exclusive use of the words Koke and Dope and that anyone who sells Coca-Cola or anything else in response to requests for Koke or Dope is guilty of unfair trading and violation of the federal trade-mark statutes. The product is sold at a cheaper price than Coca-Cola, thus appealing to the cupidity of the purchaser, as the previous arguments appeal to his timidity or dishonesty.

The record shows that salesmen of the Koke Companies systematically and continually offer these suggestions to intending purchasers. Advertisements in bottlers' trade papers and cards of representatives carry all of these assertions in positive terms. The uniformity of the salesmen's representations coinciding, as they do, exactly with the Koke Companies' trade paper announcements, and their contentions in this and the other cases pending against them show that the plan above outlined is the concerted scheme by which their business is conducted.

The evidence on these various points has been collated for convenient reference and will be found in the schedules.

Schedule I. The Coca-Cola Company's title to the trade-mark Coca-Cola and its business and a tabulation of the enormous advertising and sales of Coca-Cola.

Schedule II. The use of the abbreviation Koke and the nickname Dope, and their exclusive application to Coca-Cola.

Schedule III. The distinctiveness of the red barrel in which Coca-Cola is invariably shipped.

Schedule IV. The distinctive color and taste of Coca-Cola.

Schedule V. The suggestion of the salesmen of the Koke Companies to dealers that their product can be sold as and for Coca-Cola.

Schedule VI. The evidence that the Koke Companies' product is in fact sold as and for Coca-Cola.

Schedule VII. The evidence of the actual and deliberate fraudulent intent of the Koke Companies to pirate upon the reputation of Coca-Cola and infringe the rights of The Coca-Cola Company.

II.

Brief of Law and Authorities.

The General Rule of Law to be Applied.

The courts in the Ninth Circuit have always and from the very beginning enforced an enlightened standard of trade morals. They have always been quick to detect and reprobate practices by which unscrupulous traders have attempted to filch the business of their successful competitors. The means by which this is sought to be accom-

plished are of no consequence and in the decisions in this circuit the facts are as diverse as the devices which the ingenuity of the dishonest schemer could concoct.

The following cases show the adaptability of equity and the disposition and ability of the courts in this circuit to circumvent such parasitic activity. They include injunctions against the deceptive use of descriptive names, grade names, imitation of package, approximation of labels, simulation of identifying descriptions, distribution of imitation labels by label makers, refilling of genuine bottles with spurious goods, and oral passing off and substitution. In short, the courts of this circuit have invariably adapted themselves to the trade situation and stopped the fraud wherever found and however manifested.

In *Coleman v. Flavel*, 40 Fed., 854, Judge Deady said (856):

“The only purpose the defendants can have in using the plaintiffs’ part of this label is to avail themselves of the reputation the plaintiffs have established in the markets of the world, as dealers in canned salmon; and, even if their fish were in all respects equal to those sold by the plaintiffs, still they would, by means of false representations as to the plaintiff’s agency in the matter, so far divert or appropriate the good will of plaintiffs’ business, that has cost them time, money and good conduct to establish.

However, the fact is the defendants’ use of this label—at least, the agency part of it—on the fish in question involves a false and fraudulent representation calculated and intended to deceive the public, and injure the plaintiffs, by palming off on the former, in the name of the latter, an inferior article of salmon for a superior one. The defendants are not only seeking, by this means, to appropriate or trade on the good will of the plaintiffs’ business, but their conduct tends inevitably to injure or destroy such business.”

In *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed., 296, Mr. Justice McKenna said (297):

“Its first and almost exact imitation of complainant’s packages and device showed, not the advertisement of a new article with a reputation yet to make, but the counterfeiting of an old article with a reputation already made; and the change in the device was and is an attempt to preserve the deceit, and yet avoid liability for it.

But respondent urges that the words ‘Syrup of Figs’ are descriptive, and that complainant deceives when it uses them to designate its compound. The deceit does not appear on the face of the bill, and it is unimportant if they are descriptive. The question is now, not whether complainant has the exclusive right to use the words ‘Syrup of Figs’ or ‘Fig Syrup,’ but it is whether respondent has, by use of them and other words, and by the other imitations alleged and exhibited, so far imitated the form of complainant’s device and description to represent its goods as its goods, and appropriate its reputation and trade. The gravamen of the action is the simulation of complainant’s devices and the deception of purchasers. This is the principle of the best-considered cases, uniting them, notwithstanding their diverse facts. *Burton v. Stratton*, 12 Fed. Rep., 696; *Baking Powder Co. v. Fyfe*, 45 Fed. Rep., 799; *Nerve Food Co. v. Baumbach*, 32 Fed. Rep., 205; *Anonyme, etc., Societe v. Western Distilling Co.*, 43 Fed. Rep., 417.”

In affirming this case, *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed., 175, Judge Beatty, speaking for this court said (178):

“Why, then, should they use it, or any words or phrases in similitude thereof, unless it be thereby to induce the public to believe that the goods sold by them are those manufactured or produced by the appellee; thus palming off the former as those of the latter, which the laws says shall not be done. That such has been appellants’ design we are constrained to believe when we consider the character and size of their bottles, their paper boxes, the printing on each, and other matters connected therewith; for, it

appearing that the terms used are not merely descriptive of the preparation in either case, it cannot be conceived that it was purely by accident that appellants adopted the terms and appliances they have to make known to the public, and dispose of, their goods. While there is a difference between the two, there is still such similarity as we think would lead many purchasers, the consumer, though not likely the general trade dealer—to purchase one for the other. It is against the probability of such impositions upon the consuming class of the public that courts will extend their protection. ‘What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applied to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled.’ *McLean v. Fleming*, 96 U. S., 251.

As we construe the restraining order of the court below, it simply excludes the use by appellants of trade-marks, bottles, wrappers, and devices used in offering their preparation to the public similar to those applied by appellee to its preparation for a similar use and purpose. Appellants are not restrained from making their medicine, but from offering for sale or selling it under such or any circumstances, declarations, or representations that it may be taken as the preparation made and offered to the public by the appellee.”

These decisions on the point to which they are here cited, are in now way modified by *California Fig Syrup Co. v. Worden*, 187 U. S., 516.

In *Hennessy v. Herrmann*, 89 Fed., 669, Judge Hawley enjoined the sale of imitation labels which were designed to be used as an aid in palming off spurious brandy as Hennessy’s, saying (670):

“It is not essential that respondents should be engaged in manufacturing the labels referred to, although it would certainly be proper, if it be a fact, to so aver. The real question is whether or not they

have knowingly put into the hands of the dealers of the goods, by the sale of the labels, the means of deceiving the ultimate purchasers of the brandy. All persons in any way connected with the infringement of a trade-mark are responsible to the owner for the injury done to his rights."

In *Fairbank v. Luckel*, 102 Fed., 327, this court enjoined the use of the words "Gold Drop" as a name for washing powder as an infringement of "Gold Dust," Judge Hawley observing (330):

"Upon these general facts, without entering into details, we pass to the legal questions involved herein. It is assigned as error that 'the court erred in adjudging and decreeing that the name "Gold Drop" used by the defendant does not infringe upon the trade-mark and trade name "Gold Dust" of this complainant, and does not deceive the trade and consumers to the detriment of complainant,' and that the court erred in refusing to enter a decree in favor of complainant enjoining respondent from the commission of certain acts as prayed for in the bill of complaint. In many of the decided cases it has been held that the respondent ought not to be held liable for the imposition or fraud of the merchants or shopkeepers or their assistants in palming off upon the innocent public his goods as those of another. As an abstract proposition, this may be conceded to be correct; but it falls far short of being the only view of the case. The controlling question is whether or not the respondent has 'knowingly put into the hands of the retail dealer the means of deceiving the ultimate purchasers.' *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A., 554, 77 Fed., 869, 878, and authorities there cited; *New England Aul & Needle Co. v. Marlboro Aul & Needle Co.* (Mass.), 46 N. E., 386; *Von Mumm v. Frash* (C. C.), 56 Fed., 830, 838. The fact that 'Gold Drop' was sold to retail dealers for a less price furnished an incentive and inducement to retail dealers to dispose of 'Gold Drop' instead of 'Gold Dust,' as they thereby gained a greater profit for themselves."

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(331):

“The trade name differs from the trade-mark in this: that one appeals to the ear more than to the eye. The advertisements of the name were for the purpose of having the intended purchaser ask for ‘Gold Dust’ without his having any knowledge of the character of the label on the package he was to receive, and in this sense the fact that the infringer of the name used different devices and symbols would have no great force. The imitation of the name ‘Gold Dust,’ by which the soap or washing powder of complainant was known, would constitute an infringement, because purchasers would be liable to be misled who had no knowledge of the article except the advertised name as being the best soap or washing powder in the market. It is not unusual for a certain specific article advertised extensively, of reputed excellence, to become publicly known and called for by the name which is more readily retained in the memory. This is one of the reasons why respondent selected the name ‘Gold Drop,’—‘on account of its being short; good for advertising, and easy to remember.’

Many precautions were taken by respondent to avoid imitating complainant’s label. Is it not peculiarly significant that no efforts whatever were made in this direction with reference to the selection of a name totally dissimilar from that of ‘Gold Dust’? Why was ‘Gold Drop’ selected? There were plenty of other names that were short and easy to remember. Other manufacturers of washing soap had found no difficulty in this regard; for instance: ‘Pearline’; ‘Babbit, 1776,’ etc. When these facts are considered, is it not reasonably clear that in selecting ‘Gold Drop,’ which conveys to the mind so close an imitation of ‘Gold Dust,’ that there was some intention or design upon the part of respondent to impose ‘Gold Drop’ upon the public as that of ‘Gold Dust,’ or, at least, to obtain some advantage or benefit from complainant’s advertised trade name ‘Gold Dust’? Was not this result accomplished whether so intended or not?”

In *Hostetter v. Martinoni*, 110 Fed., 524, Judge Morrow issued an injunction against the sale in bulk and in demi-

johns labeled "H. Bitters," of imitation bitters as Hostetter's bitters, saying (525):

"With regard to the first contention of the defendant, whether the names by which complainant's preparation are known to the trade are merely descriptive or not, the complainant's rights to the benefits arising from the high reputation of the preparation designated by such names, gained by the efforts of complainant and its predecessors through many years, is undoubted. It is a fundamental principle of the law that one cannot make use of a reputation which another has acquired in a trade name or mark for the purpose of deriving such advantage in the manufacture and sale of the goods as arises from the good will and reputation of the original manufacture. Courts demand a high order of commercial integrity in the use by competitors of a name under which a rival has gained a business reputation, whether that name is strictly a trade-mark or is descriptive of quality merely, and frown upon all fleching attempts to obtain the reputation of another. *Fuller v. Huff*, 43 C. C. A., 453, 104 Fed., 141, 51 L. R. A., 332, and cases cited. Did, then, the defendant wrongfully attempt to use the reputation of complainant's preparation for his own advantage?"

In *Van Hoboken v. Mohns & Kaltenbach*, 112 Fed., 528, Judge Morrow enjoined the refilling of empty gin bottles bearing the distillers' monogram even though the genuine paper label and stamp on the cork were not used, saying (530):

"A fundamental principle in the law of trade-marks is the protection of the owner of the trade-mark against fraud in its use by others. This fraud may consist in such use of a trade name or mark as to induce purchasers to believe that they are obtaining the article which has won reputation under the particular name or mark. It has been held that, even where a geographical name has been adopted and claimed as a trade-mark and become a well-known sign and synonym for superior excellence, its use will not be permitted by persons residing at other places for the purpose by fraud and false rep-

resentation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up.”

(531):

“If we consider the case as one of unfair competition, the same result must follow. As was said in the various Hostetter cases (U. C.), 84 Fed., 333, 107 Fed., 705, and 110 Fed., 524, the doctrine of unfair competition rests upon the proposition that men must be honest in their business transactions, and rely upon the merits of their own goods, and not undertake to palm off inferior goods as and for the goods of the genuine manufacturer. Even if the respondent in the case at bar was using the bottles of complainants as a mere convenience, without dishonest motives, the custom of refilling receptacles bearing distinctive trade names or marks with other manufacturers is too dangerous, and allows too great an opportunity for fraud against the owners of valuable preparations, to be permitted.”

In *Keuffel v. Crocker*, 118 Fed., 187, defendant imitated a series of grade names long used by the complainant and approximated the shapes and styles of complainant's packages extensively employed as designations and dress for draughting materials. Judge Morrow said (189):

“Upon the evidence now before the court, therefore, the complainant must be presumed to have established the high reputation of its goods, in connection with which the trade names used by it were of considerable value. The defendant, then, entering the field of competition, when the complainant's goods were in this situation, appears to have acted with design in the adoption of labels of general design and appearance in imitation of those used by the complainant, including the selection of similar names for the description of like goods. The complainant's goods had become known to the eye by the form of package (consisting of a roll), the peculiar color of the outside wrapper inclosing this package, and the distinctive label describing the contents.

These labels were alike for the different varieties of paper, differing only in the name describing the particular kind. It required a second glance to distinguish the particular name upon each package, while the general effect of the label as a whole was easily comprehended at the first glance. Every feature of this style of wrapping and marking was apparently copied by the defendant, with the result that close scrutiny was required to distinguish its packages from those of the complainant. Such use of names, labels and wrappers was undoubtedly infringement, and the sale of such goods so wrapped, labeled, and marked was unfair competition."

* * * * *

(190):

"The law applicable to this case may be stated in a few words. It requires the defendant, in offering his goods to the public, to use such method of wrapping, labeling and cataloguing of his packages as not to lead an intending purchaser, of ordinary intelligence, using ordinary care, into the mistaken belief that he is purchasing goods placed upon the market by the complainant, when in fact he is purchasing the defendant's goods. The defendant does not appear to have observed this requirement, and the complainant is, therefore, entitled to the protection of a temporary injunction. It is immaterial that the defendant has changed the form of its label since this action was commenced. The complaint is directed against the acts of the defendant committed prior to the commencement of the action."

In *Enoch Morgan's Sons v. Whittier-Coburn Co.*, 118 Fed., 657, defendant, in an attempt to compete with Sapolio, called his scouring soap "Sapho," approximated the shape and size of complainant's cakes and simulated its labels. Judge Morrow said (661):

"The word 'Sapho,' commencing and ending with the same letters as 'Sapolio,' and arranged in the same position upon the packages of soap, presents so similar an appearance to the eye in an ordinary glance that, in my opinion, it could easily be mis-

taken for 'Sapolio.' A minute and careful inspection will, of course, reveal the fact that it is a different preparation; but, in legal contemplation, infringement occurs when 'the resemblance is such as to deceive an ordinary purchaser giving such attention to the same as such a purchaser usually gives.' *McLean v. Fleming*, *supra*; *Sterling Remedy Co. v. Eureka Chemical & Mfg. Co.*, 80 Fed., 105, 25 C. C. A., 314; *Saxlehner v. Eisner & Mendelson Co.*, 179 U. S., 19, 41, 21 Sup. Ct., 7, 45 L. Ed., 60.

While it is true that no one has a monopoly of form, of color, or of the shape of letters, it has repeatedly been held that one may not use the color that another has selected as a distinguishing mark of his goods, or use the same arrangement of letters and of marks, when such use is with the design to market his goods as the goods of another. *Hires Co. v. Consumers' Co.*, 100 Fed., 809, 41 C. C. A., 71. It is within the discretion of the court to enjoin such an imitation of another's goods, when it is proven directly or by strong inferential evidence that the imitation was willfully made, or when such imitation, even though innocently made, results in damage to the one whose rights are infringed. In the present case the evidence shows that the goods of the defendant have been mistaken by purchasers for those of the complainant, probably by the design of the dealer. And, though there is no evidence connecting such dishonest dealing with the defendant in any way, the fact that it so dresses its goods as to give an easy opportunity to the unscrupulous dealer to delude the consuming purchaser is very persuasive evidence that an intention existed to enter into competition with the manufacturer whose goods were already well established, and to carry on such competition in a manner which courts of equity hold to be unfair."

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(662):

"It follows that the rights of the complainant in and to its trade name are infringed by the acts of the defendant, and that the imitation of complain-

ant's packages by defendant is unlawful, in that it tends to create confusion in the trade, and work a fraud upon the public by inducing it to accept the goods of defendant for those of complainant."

In *Kostering v. Seattle Brewing & Malting Co.*, 116 Fed., 620, this court enjoined an imitated beer label. Judge Gilbert, after comparing the two, used the following language (621):

"These differences are such as are usually introduced where the intention is to make an unfair use of an established trade-mark, and at the same time so far depart therefrom as to avoid the charge of infringement. It is argued, and it is true, that the differences are apparent to anyone who will read and examine the labels, but that argument does not meet the question which the case presents: Are the resemblances between the two labels such that the consumer is likely to be misled? We have no hesitation in saying that they are, and that the variations are wholly insufficient to avoid the charge of infringement, or create a doubt that the label of the appellant was copied from that of the appellee, and was made in close imitation of all its salient features. A consumer who has been accustomed to purchase an article in a dress or a package which has become familiar to him does not stop to read and examine. Many of the consumers of beer are unable to read, and many are foreigners, and unacquainted with the English language. All consumers, whether able to read or not, are in fact guided by the general appearance of the package or label which is before them. The general appearance of the beer bottles, carrying these two respective labels, is strikingly similar. No argument can add force to the conviction which is produced by the mere sight of them. *Collinsplatt v. Finlayson* (C. C.), 88 Fed., 693; *Fairbank Co. v. R. W. Bell Mfg. Co.*, 23 C. C. A., 554, 77 Fed., 869; *Biscuit Co. v. Baker* (C. C.), 95 Fed., 135."

In *Standard Varnish Works v. Fisher*, 153 Fed., 928, there was involved the alleged deceptive use of the name

“Turpentine Shellac.” Judge Wolverton overruled a demurrer, saying (930) :

“As a trade name, it may be properly so employed, but within itself it is inapt for exclusive appropriation as a trade-mark. Beyond this, however, words or symbols naturally descriptive of the product, while not adapted for exclusive use as a trade-mark, may yet acquire, by long and general usage in connection with the preparation and by association with the name of the manufacturer, a secondary meaning or signification, such as will express or betoken the goods of that manufacturer only, and in this sense he will be entitled to protection from an unfair use of the designation or trade name by others that may result in his injury and in fraud of the public.

The principle that one person or firm should not sell his goods as the goods of another person or firm lies at the bottom of the legal objection, and it is the making use of the trade name, which by a peculiar and particular signification betokens the goods of a particular manufacturer, for the purpose of foisting the goods of another, especially if they be of inferior stamp or quality, upon the market as the goods of that manufacturer, that the law will not tolerate. Such a practice is unfair and injurious both to the proprietor or manufacturer and to the public.”

Judge Wolverton, speaking for this court, in *G. Heileman Brewing Co. v. Independent Brewing Co.*, 191 Fed., 489, a case involving imitation of beer labels, remarked (492) :

“A suit for unfair competition may be maintained where there is no lawful trade-mark involved, which consists essentially in palming the goods of one manufacturer or vendor off for the goods of another. This is a fraud not only upon the manufacturer whose goods are assimilated and replaced in the market, but upon the general public as well, which does not get what it supposes it is bargaining for. For the fraud thus perpetrated, the individual or the manufacturer, as the case may be, has his or its cause of suit to prevent the recurrence of the im-

position, and for such damages as may have been sustained on account of it.”

* * * *

(494) :

“The last and cardinal contention is that the label used by the defendant is not an infringement upon complainant’s trade-mark. A simple inspection of the two labels, as shown by Exhibits A and C attached to the complaint, convinces one that the defendant’s label was suggested by that of complainant, which latter consists essentially, as is alleged in the complaint, of a conventional or typical Dutch or German scene, and the situation is really resolved into the question whether the defendant has so differentiated its label in the manner of its design and detail of execution as to avoid infringement of complainant’s label. There is a manifest effort at artful simulation to be attended with barely sufficient differentiation to escape infringement. Has the defendant succeeded, and does the complaint so show upon its face?”

After describing the two labels, Judge Wolverton concludes (497) :

“Now, to one scanning the detailed description of these two Dutch scenes, or laying the pictures side by side, there could be no trouble in distinguishing the one from the other. But this is not the test. Will confusion result to the purchasing public by the use of the two not brought into direct or special comparison? Would the ordinary customer applying at the counter for ‘Old Style Lager,’ observing the care customary with purchasers in that way, be likely to be deceived or misled into buying ‘Old German Lager,’ if it was offered him marked with defendant’s label? We are impressed that he would.

A simulation of the most prominent and distinctive features of the complainant’s label, is found in the defendant’s label. The inn is there, with the legend in slightly different wording suspended from a scroll; the representation of men drinking at a table outside of the inn is there; the barrels or casks in the subway are there; the monks drinking at a table at or near the casks are there; and the coopering of a barrel

is there. In short, the 'ensemble' is there, and that, says the court in *Cantrell & Cochrane v. Butler*, *supra*, does the mischief. And quoting again:

'The usual purchaser neither abstracts nor analyzes for the purpose of differentiation and judgment.'

The complaint, fairly construed, we think, shows infringement upon the face of it. What the evidence may show at the trial is quite a different thing."

In *Weinstock v. Marks*, 109 Cal., 529, 42 Pac., 142, complainant operated a store of peculiar architecture in Sacramento. He called his establishment "Mechanics' Store." Defendant, next door, erected a building of similar architecture, to which he applied the name "Mechanical Store." Judge Garroute, speaking for the Supreme Court, said (145):

"Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of unlawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there was no relief. This cannot be so, for the whole law of trade-marks, trade names, etc., is recognized, approved and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that 'no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and

eluded by new schemes which the fertility of man's invention would contrive.' By device, defendant is defrauding plaintiff of its business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader."

* * * * *

"We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive."

* * * * *

"In the leading case of *Lee v. Haley*, *supra*, the whole question is condensed by the final conclusion of the court into the principle of law 'that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person.' If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, 'If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?' Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trade-marks and trade names. They reach away beyond that,

and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent."

In *Banzhaf v. Chase*, 150 Cal., 180, 88 Pac., 704, it was sought to protect the name "Old Homestead" for bread. Justice Shaw remarked (705):

"The case of the plaintiffs does not depend on its right to the exclusive use of the words in question. It is based on fraud. It rests on the right of the plaintiffs to restrain the conduct of the defendant whereby he, in order to injure the plaintiff and benefit himself, simulates the plaintiffs' goods, deceives the plaintiffs' patrons into the belief that his bread is that made by the plaintiffs and thereby induces them to buy his own bread instead of the plaintiffs', thus, by fraud and deception, depriving the plaintiffs of the profits of such sales and appropriating the same to his own use. The right to prevent such an injury by injunction does not depend on the ownership by the plaintiffs of any particular word, phrase, or device, as a trade-mark. If the words in question constituted a trade-mark of the plaintiffs, as defined by law, and the defendant was using it to plaintiffs' injury, he would be restrained, although he were in entire ignorance of plaintiffs' prior use, or right, and were using it in good faith, with good motives, with no intent to injure any person, and no consciousness of such injury. But where one purposely imitates the goods, signs, or place of business of another, in order, by deceiving the other's patrons, to sell his own goods as the goods of the other, and thereby obtain for himself the profits which would otherwise go to the other, it is not necessary that the devices, words, or signs which are imitated shall constitute a trade-mark. The right of action in such a case arises from the fraudulent purpose and conduct of the defendant and the injury caused to the plaintiffs thereby, and it exists independently of the law regulating trade-marks, or of the ownership of such trade-mark by the plaintiffs. The gist of such an action is not the appropriation and use of another's trade-

mark, but the fraudulent injury to, and appropriation of, another's trade."

The net result of the foregoing cases is that unfair trading is a question of fact. The rule of law is general and without exception—that nobody has any right to represent his goods as the goods of somebody else—it does not make any difference how the representation may be made. It is the question of fact, whether the false representation is being made with which the court is concerned, and if this fact appears from the evidence, relief will be accorded and the efficient means by which it is accomplished will be enjoined.

This rule was accepted and applied by the court below in this case. Judge Sawtelle found as a fact that the Koke Companies were intentionally and purposely endeavoring to pirate the Coca-Cola Company's business and sell their product as and for Coca-Cola; that they intentionally adopted means which they knew would accomplish this purpose, and that these means did in fact accomplish it; that the Koke Company's goods, when sold under the names Koke and Dope, were sold as and for Coca-Cola. Judge Sawtelle thereupon entered a decree which stopped the fraud, and unless this court is prepared to reverse a long line of decisions which it has made, enjoining practices much less flagrant than those which the record here discloses, it necessarily follows that the decision of the court below must be affirmed.

Judge Sawtelle has well summarized the principle by which cases of this description are decided.

In *Coca-Cola Co. v. The Koke Company of America et al.*, 235 Fed., 408, 411, he said:

"Numerous authorities have been cited by both sides, with variant facts, but as each case must be determined on all facts that surround it, the facts in any prior case cannot be a guide to the decision of

the subsequent. This view is cogently pointed out on page three of lectures of John Cutler, of King's College, entitled 'Passing Off.'

The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated: 'no man has a right to pass off his goods as though they were the goods of another.'

'The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another.' "

Canal Company v. Clark, 13 Wall., 311.

"The difficulties which arise are in the application of this principle to the facts of the particular case, and the question which the court has to decide is always a question of fact. The decision of the court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be considered in arriving at a conclusion."

The particular means by which the Koke Companies perpetrate the fraud and accomplish the sale of their goods as and for Coca-Cola are the use of the nicknames by which Coca-Cola is known and by imitating the visual appearance of Coca-Cola, its labels and containers.

The use of the nicknames is the principal offense but the imitation of label, barrel and drink itself are efficient aids in the scheme of fraud. As Judge Sawtelle observed:

"The witness Wright of the Southern Koke Company justified the use of the name 'Koke,' for he says that the name 'Koke' was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word 'Dope' was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words were an abbreviation of the words 'Coca-Cola' and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

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In view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness."

The imitation of the characteristic script in which the word Coca-Cola is always printed, the red barrel invariably used as a container for Coca-Cola syrup and the duplication of the appearance of the drink have their counterparts in *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720 (C. C. A., Sixth Circuit), where Judge Denison said:

"Complainant also asks that the injunction extend to the use of the barrels or kegs painted of the same color as complainant's, and to coloring the product itself with the same color, and to using any packages not plainly marked Gay Ola. Whether the injunction should have this scope must be considered.

It is first to be observed that defendant is at the best on a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the 'trade-mark' names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or bad faith is the criterion, and their presence puts upon the user a burden of care to see that deception does not naturally result. Conversely, when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying acts, and some which otherwise might be innocent become guilty. So here. The red color used by complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly; but this color has long been used by complainant in a way that was exclusive

in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant's scheme of fraud. So, too, with defendant's failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden.

The question remains whether the injunction should go to the extent of forbidding defendant to sell Gay Ola with the identical color it now has—that is, to forbid its sale unless colored so as to distinguish it from Coca-Cola. Defendant contends that such a prohibition is inconsistent with its legal right to make and sell an article which is in fact exactly like Coca-Cola. This contention seems unpersuasive in view of defendant's pleading. In its answer, it has abandoned the claim of its advertising literature that Gay Ola is made exactly according to the Coca-Cola formula, and urges that its product is a different and better compound. It says that it has improved upon the formula of Coca-Cola, while eliminating one of the elements, and that its product is 'greatly superior' to Coca-Cola. It thus destroys a considerable part of the foundation, upon which rests its claimed right to adopt a color which will be deceptive; but we pass by this consideration.

The record justifies the conclusion that the color is 'Non-functional'—to use the phraseology of the patent law. The bill alleges that Gay Ola is 'artificially and unnecessarily' colored so as to look exactly like Coca-Cola. The answer denies this in terms, but it goes on to say that the color is produced by caramel which is in universal use for coloring purposes and is used by complainant for coloring Coca-Cola. There is here no claim that caramel serves any other purpose in either compound, except merely to give color, and saying that it is one of the 'component elements,' as one of the witnesses does, is saying nothing more. It follows that the adoption not only of caramel but of the selected

amount of caramel was for the main and primary purpose of making the two articles look just alike. In this connection it appears that there is a great variety of coloring materials open to the use of any manufacturer, and selections from which are used by other manufacturers.

The record also requires the conclusion that defendant's business had a substantial basis in this contemplated fraud. Doubtless it intended to try to make a reputation and business for Gay Ola on its own merits in certain quarters, and perhaps eventually in a general way; but it is clear that in the meantime, and wherever it could, and as the easiest way of getting a large business, it intended to have its product sold as and for Coca-Cola. Under these circumstances, we need not consider what the rule would be if the color was the incidental result of an ingredient used for some other purpose, nor yet what the rule would be if the defendant had adopted ever a wholly unnecessary identity in color in connection with a good-faith effort to sell its own goods on their own merits. This court has not yet said that a case of fraudulent competition can be made out solely by proof of identity in a nonfunctional particular. *Rathbone Co. v. Champion*, *supra*; *Hilker Mop Co. v. U. S. Mop Co.*, 191 Fed., 613, 112 C. C. A., 176. This case is not even one of imitating matters of appearance in an article of common manufacture, like furniture. *Globe-Wernicke Co. v. Macey Co.*, 119 Fed., 696, 704, 56 C. C. A., 304. We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and that, so far as defendant cannot safeguard this result, it may not use the color. There is here marked—indeed, close—analogy to the rule of *Westinghouse Co. v. Wagner Co.*, 225 U. S., 604, 32 Sup. Ct., 691, 56 L. Ed., 1222, and to the rule which requires an article which is likely to deceive as to its origin to be distinctly tagged with

the name of the real producer. *Merriam v. Saalfeld, supra.* It goes without saying that this tag should be in form adapted to reach the notice of the final purchaser.

As to the bottling part of the output, defendant could apparently provide reasonably efficient means of notice, and so probably prevent deception by seeing to it that all the bottles were stamped and labeled prominently with the name of its product. As to the soda fountain part of the output, we do not at present see how deception could be efficiently prevented, save by giving the product a nondeceptive color, although some other satisfactory means may be brought to the attention of the court below. The defendant should be enjoined from selling Gay Ola of a color the same as or substantially similar to Coca-Cola, unless and in so far as upon settlement of the decree below means may be provided by which the ultimate consumer will be fairly advised that he is not getting complainant's Coca-Cola, but is getting something else."

On settlement of the decree see:

Coca-Cola Co. v. Gay-Ola Co., 211 Fed., 942.

That the name Coca-Cola is a valid trade-mark is shown by the following cases:

Coca-Cola Co. v. American Druggists Syndicate,
200 Fed., 107.

Coca-Cola Co. v. Deacon Brown Bottling Co.,
200 Fed., 105.

Coca-Cola Co. v. Nashville Syrup Co., 200 Fed.,
153, 157; 215 Fed., 527.

Coca-Cola Co. v. Virginia Syrup Co., 3 T. M.
Rep., 126.

Coca-Cola Co. v. J. G. Butler & Sons, 229 Fed.,
224.

Coca-Cola Co. v. Koke Co., 235 Fed., 408.

Coca-Cola Co. v. Bennett, 238 Fed., 513.

It is the universal rule that it is of no consequence by what means passing off and fraud are effectuated. It is the result, the actual passing off, however accomplished, that courts of equity prevent by enjoining the efficient means.

Burgess v. Burgess, 3 De G. M. & G., 896.

Reddaway v. Banham, 1896, A. C., 199, 13 R. P. C., 224.

Powell v. Birmingham Vinegar Brewery Co., 1897, A. C., 710, 14 R. P. C., 727.

Dennison v. Thomas, 94 Fed., 651, 656.

A. G. Spalding & Bros. v. Gamage, 32 R. P. C., 273.

Shaver v. Heller, 108 Fed., 821, 827.

Thompson v. Montgomery (1891), A. C., 217, 6 R. P. C., 404, 407, 8 R. P. C., 361, 365.

In determining whether or not a false representation is made, the ultimate purchaser is the person considered and any device or artifice which may be calculated to deceive the ordinary, inattentive buyer is unlawful.

Liggett & Meyer v. Hynes, 20 Fed., 883, 885.

Liebig's Extract of Meat Co. v. Chemists Co.-Op. Soc., 13 R. P. C., 635, 644, 736.

Florence Co. v. Dowd, 178 Fed., 73, 75.

Cauffman v. Schuler, 123 Fed., 205, 206.

Bissell v. Bissell, 121 Fed., 357, 365.

Blackwell v. Armistead, 3 Hughes, 163; F. C., 1474, p. 548.

Scriven v. North, 134 Fed., 366, 379.

Pillsbury v. Pillsbury, 64 Fed., 841, 847.

Birmingham Small Arms Co., Ltd., v. Webb, 24 R. P. C., 27, 31.

Any word or name, whatever its original character or its primary significance, which by association has ac-

quired an understood meaning identifying the goods of a certain producer, will be protected against imitation.

Wotherspoon v. Currie, L. R., 5 House of Lords, 508; 27 Law Times (N. S.), 393.

Lee v. Haley, 21 L. T. (N. S.), 546; L. R., 5 Ch., 155; 22 L. T. (N. S.), 251.

Thompson v. Montgomery, 6 R. P. C., 404, 407; 8 R. P. C., 361, 365 (1891), App. Cas., 217.

Reddaway v. Banham (1896), A. C., 199; 13 R. P. C., 218.

Reddaway v. Ahlers, 19 R. P. C., 12.

Reddaway v. Stevenson, 20 R. P. C., 276.

Reddaway v. Frictionless Packing Co., 19 R. P. C., 505.

Reddaway v. Irwell, 23 R. P. C., 621.

The Yorkshire Relish case (*Powell v. Birmingham Vinegar Co.*, 13 R. P. C., 235 (1894), 3 Ch. Div., 449 (1894), 3 Ch., 462 (1896), 2 Ch., 54 (1897), App. Cas., 710, 14 R. P. C., 720.

The English courts have consistently adhered to this doctrine, as is shown in the "Silver Pan" jam case (*Faulder v. Rushton*, 20 R. P. C., 477), and in the cases of *North Cheshire Brewing Co. v. Manchester Brewery Co.* (1899), App. Cas., 83; *Saxlehner v. Apollinaris Co.* (1897), 1 Ch., 893; 14 R. P. C., 645; the "Horse Shoe" boiler case, *Kinnell v. Ballantine*, 26 R. P. C., 12; 27 R. P. C., 185; the "Slip on" coat case, *Burberrys v. Raper*, 23 R. P. C., 170; the "Chartreuse" case, *Rey v. Lecouturier*, 25 R. P. C., 265, 284; 27 R. P. C., 268, 278.

The courts in this country have accepted the principle of secondary meaning, among them the Supreme Court of the United States. For example: *Reddaway v. Banham* has been expressly approved in *Elgin National Watch Company v. Illinois Watch Case Company*, 179 U.

S., 665, and its doctrine stated as the law of this country in *French Republic v. Saratoga Vichy Co.*, 191 U. S., 427, 435.

This theory was accepted completely in *Shaver v. Heller & Merz*, 108 Fed., 821, where the word "American" was protected, and *Wolf v. Hamilton-Brown Shoe Co.*, 165 Fed., 413; 240 U. S., 251 (American Girl), and the doctrine is now thoroughly established in this country, as is shown by the following cases, where the word or name protected is indicated: (*Chartreuse*), *Baglin v. Cusenier*, 221 U. S., 580; (*Beecham's Pills*), *Jacobs v. Beecham*, 221 U. S., 263; (*Health Food*), *Fuller v. Huff*, 104 Fed., 141; ("Air Cushion," Rubber Horse Shoes), *Revere Rubber Co. v. Consolidated Hoof Pad Co.*, 139 Fed., 151; (*Elastic Seam Drawers*), *Scriven v. North*, 134 Fed., 366; *Scriven v. Girard*, 140 Fed., 794; (*Celery Compound*), *Wells & Richardson Co. v. Siegel, Cooper & Co.*, 106 Fed., 77; (*Elgin Watches*), *Elgin National Watch Co. v. Loveland*, 132 Fed., 41; (*Waltham Watches*), *American Waltham Watch Co. v. U. S. Watch Co.*, 173 Mass., 85; 53 N. E., 141; *American Waltham Watch Co. v. Sandman*, 96 Fed., 330; (*Boston Trade Peanut Roasting Co.*), *Viano v. Baccigalupo*, 183 Mass., 160; 67 N. E., 641; (*Robe and Tanning Co.*), *Dyment v. Lewis*, 123 N. W. (Iowa), 244; (*Dr. Drake German Croup Remedy*), *Drake Medicine Co. v. Glessner*, 68 Ohio St., 337; 67 N. E., 722, 726; (*Lexington Mustard*), *Metcalfe v. Brand*, 9 Ky. Law Rep., 801, 5 S. W., 773, 779; (*Turpentine Shellac*), *Standard Varnish Works v. Fischer*, 153 Fed., 928; (*U. S. Dental Parlors*), *Cady v. Schultz*, 19 R. I., 193, 32 Atl., 915; (*Portland Stoves*), *Van Horn v. Coogan*, 52 N. J. Eq., 380, 28 Atl., 788; (*Keystone Oils*), *Buzby v. Davis*, 150 Fed., 275; (*High Standard*), *Lowe Bros. v. Toledo Varnish Co.*, 168 Fed., 627; (*Anderson Cheese Cutter*), *Computing Cheese Cutter Co. v. Dunn* (Ind.

App.), 88 N. E., 93; (Bates Numbering Machine), *Bates v. Bates*, 172 Fed., 892; (Angostura Bitters), *Siegert v. Gandolfi*, 149 Fed., 100; (Spanish Tile Cohesive Tile), *Guastarino v. Comerma*, 180 Fed., 920; (Beats All Pencil), *American Leal Pencil Co. v. Gottlieb*, 181 Fed., 178; (Keep Clean Brushes), *Florence Mfg. Co. v. Dowd*, 178 Fed., 73; (Holeproof Hosiery), *Holeproof Hosiery Co. v. Wallach Bros.*, 172 Fed., 859; *Holeproof Hosiery Co. v. Fitts*, 167 Fed., 378; *Holeproof Hosiery Co. v. Richmond Hosiery Mills*, 167 Fed., 381; (Baker's Cocoa, Baker's Chocolate), *Walter Baker & Co. v. Baker*, 77 Fed., 181; *Walter Baker & Co. v. Sanders*, 80 Fed., 889; *Walter Baker & Co. v. William P. Baker*, 87 Fed., 209; *Walter Baker & Co. v. Slack*, 130 Fed., 514; (Garrett Snuff), *Garrett v. Garrett*, 78 Fed., 472; (Royal Baking Powder), *Royal Baking Powder Co. v. R. P. Royal*, 122 Fed., 337.

Nicknames, abbreviations or short names, given by the public to a particular article, are protected against imitation to the same extent as any other identifying word or device.

Carroll v. Ertheiler, 1 Fed., 688.

Walter Baker & Co. v. Harrison, 138 O. G., 770;
1909 C. D., 284; 32 App. D. C., 272.

Saxlehner v. Apollinaris Co., 14 R. P. C., 645,
652.

In re Indian Portland Cement Co., 134 O. G.,
518; (1908) C. D., 361; 30 App. D. C., 463.

In re S. C. Herbst Importing Co., 134 O. G.,
1565; (1908) C. D., 383; 30 App. D. C., 297.

Heublein et al. v. Adams et al., 125 Fed. Rep.,
782.

Ehret v. Star Brewery Co., 136 O. G., 1533;
(1908) C. D., 511; 31 App. D. C., 507.

- Summit City Soap Works v. The Standard Soap Co.*, 174 O. G., 587; (1912) C. D., 430; 37 App. D. C., 604.
- In re John Braadland, Ltd.*, 174 O. G., 1029; (1912) C. D., 432; 37 App. D. C., 602.
- In re Reisch Brewing Co.*, 188 O. G., 811; (1913) C. D., 321; 39 App. D. C., 445.
- The Ellison-Harvey Co. v. Monarch*, 128 O. G., 2530; C. D. (1907), 170.
- Ex parte The Waterproofing Co.*, 145 O. G., 255; (1909) C. D., 123.
- Ex parte The Utrecht Export Cy. Griendt Brothers, Ltd.*, 183 O. G., 784; C. D. (1912), 304.
- American Lubricating Oil Co.*, Com. Dec., 1876, 56 Newton Digest, 267.
- Hernsheim & Bros.*, 21 Pat. Off. MS. D 98; Newton's Digest, 283.
- In re Palmer*, 22 Pat. Off. MS. D 386; Newton's Digest, 292.
- In re Short, Nerney & Co.*, 54 MS. D 457; Newton's Digest, 318.
- Schrauder v. Beresford & Co.*, Pat. Off. June 27, 1872, Sebastian T. M. 131 Note (b).
- Welsbach Light Co. v. Adam*, 107 Fed., 463.
- Philadelphia Trust & Safe Deposit Co. v. Philadelphia Trust Co.*, 123 Fed., 534.
- Becker v. Gambrill*, 179 O. G., 1111; 38 App. D. C., 585; (1912) C. D., 503.
- Denver Chemical Mfg. Co. v. Lilley*, 216 Fed., 869, 870.
- White v. Miller*, 50 Fed., 277.
- Walter Baker & Co. v. Puritan Pure Food Co.*, 139 Fed., 680.
- Hutchinson v. Blumberg*, 51 Fed., 829.

- Johnson & Johnson v. Bauer & Black*, 82 Fed., 662.
- American Tin Plate Co. v. Licking Roller Mill Co.*, 158 Fed., 690.
- DeVoe Snuff Co. v. Wolff* (C. C. A., Sixth Circuit), 206 Fed., 420.
- Seixo v. Provezende*, L. R., 1 Ch., 192; 14 L. T., 314.
- Read v. Richardson*, 45 L. T. N. S., 54.
- Wilkinson v. Griffith Bros. and Co.*, 8 R. P. C., 370.
- Orr Ewing and Co. v. Johnston and Co.*, 40 L. T., N. S., 307, 309.
- In re Worthington's T. M.*, L. R., 14, Ch. D., 8; 42 L. T. N. S., 563.
- Barsalou v. Darling*, 9 Can. Sup. Ct., 681; 1 Can. Com. Law Rep., 71.
- Smith v. Fair*, 14 Ont. Rep., 729; 3 Can. Com. Law Rep., 152.
- In re Baschiera's Trade-Mark*, 33 Solr's Journal, 469.
- In the Matter of Dewhurst's Application for a Trade-Mark*, 13 R. P. C., 289.
- La Societe Anonyme des Verreries de l'Etoile*, 11 R. P. C., 142.
- Curtis & Harvey v. Pape*, 5 R. P. C., 146.
- Price's Patent Candle Co. v. Jeyes' Sanitary Compounds Co.*, 19 R. P. C., 17.
- The Upper Assam Tea Company v. Herbert*, 7 R. P. C., 183.
- In the Matter of Currie & Co.'s Application for a Trade-Mark*, 13 R. P. C., 681.
- Re Barker's Trade-Mark*, 53 L. T., N. S., 23.
- Anglo-Swiss Condensed Milk Co. v. Metcalf*, 3 R. P. C., 28.

- Hodgson and Simpson v. Kynoch, Ltd.*, 15 R. P. C., 465.
- Cartier v. Carlile*, 31 Beav., 292.
- Cartier v. May*, July 12, 1861, Wood, V. C., Cox Man., 200.
- Edelsten v. Edelsten*, 1 DeG., J. & S., 185; 7 L. T. N. S., 768.
- Henderson v. Jorss*, June 21, 1861, Wood, V. C., Cox Man., 198.
- Standish v. Whitwell*, March 9th, 1856, Wood, V. C., 14 W. R., 512.
- Dixon v. Jackson*, 3 Ser., Scottish Sess. Cas., v. 326.
- In the Matter of the Application of Pomril, Ltd., for a Trade-Mark*, 18 R. P. C., 181.
- Boord v. Huddart*, 21 R. P. C., 149.
- Moses v. Sargood*, Cox Man., 636.
- Cartier v. Westhead*, Cox Man., 199.
- In re Jelley Sons & Jones*, 51 L. J. Ch., 639.
- In re Whitely*, 43 L. T. (N. S.), 627.
- In re Rabone*, Cox Man., 643.

The imitation by the Koke Companies of the Coca-Cola script and bottle labels is unfair and enjoinalbe.

- Saxlehner v. Eisner*, 179 U. S., 19.
- W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 62 Atl., 499, 504.
- Godillot v. American Grocery Co.*, 71 Fed., 873.
- Cusimano v. Oil Co.*, 114 La., 314; 38 So., 200.
- Liggett v. Hynes*, 20 Fed., 883, 885.
- Smith v. Carron*, 13 R. P. C., 109, 111.
- Perry v. Truefitt*, 6 Beav., 66.
- Croft v. Day*, 7 Beav., 84.
- Woollam v. Ratcliff*, 1 H. & M., 259.
- Frese v. Bachof*, 14 Blatchf., 432; F. C., 5110.

- Wellman & Dwire T. Co. v. Ware Tobacco Works*, 46 Fed., 289.
- Fischer v. Blank*, 33 N. E., 1040; 138 N. Y., 244.
- Amoskeag Co. v. Spear*, 2 Sandf. Supp. Ct., 599, R. Cox, 87, 95.
- Paris Medicine Co. v. Hill*, 102 Fed., 148, 150.
- Blackwell v. Armisted*, F. C., 1474, p. 548.
- Bickmore Co. v. Karns*, 134 Fed., 833, 835.
- Cantrell & Cochrane v. Butler*, 124 Fed., 290, 291.
- Enterprise Co. v. Landers*, 124 Fed., 923, 928.
- National Biscuit Co. v. Ohio Baking Co.*, 127 Fed., 160, 161.
- Kronthal Waters Co. v. Becker*, 137 Fed., 649, 658.
- Singer Co. v. Bent*, 163 U. S., 205.
- Kostering v. Seattle Brewing Co.*, 116 Fed., 620.
- Lalace & Grosjean Mnfg. Co. v. National Enameling & Stamping Co.*, 109 Fed., 317.
- Hansen v. Siegel-Cooper Co.*, 106 Fed., 690.
- National Biscuit Co. v. Baker*, 95 Fed., 135, 136.
- Colinsplatt v. Finlayson*, 88 Fed., 693.
- Cuervo v. Owl Cigar Co.*, 68 Fed., 541.
- Liebig's Extract of Meat Co. v. Chemists' Co-Op. Soc.*, 13 R. P. C., 635.
- Kyle v. Perfection Mattress Co.*, 127 Ala., 39; 28 So., 545.
- Schendel v. Silver*, 18 N. Y. S., 1, 2.
- Lever v. Goodwin*, 4 R. P. C., 492, 502.
- Barlow v. Johnson*, 7 R. P. C., 395, 407.
- Pillsbury v. Pillsbury*, 64 Fed., 841, 846.
- McLean v. Fleming*, 96 U. S., 245.
- Sawyer v. Kellogg*, 7 Fed. Rep., 721; 9 Fed. Rep., 601.
- Battle v. Finley*, 45 Fed. Rep., 796.

- Fairbank Co. v. Bell*, 77 Fed. Rep., 869.
Fischer v. Blank, 138 N. Y., 244, 251, 252.
Johnson v. Bauer, 82 Fed. Rep., 662.
Pillsbury v. Eagle, 86 Fed. Rep., 608.
Raymond v. Royal Baking Co., 70 Fed. Rep., 376;
 85 Fed. Rep., 231.
Meyer v. Bull, 58 Fed. Rep., 884.
Le Page v. Russia Cement Co., 51 Fed. Rep.,
 941.
Taylor v. Taylor, 23 L. J. Ch., 255.
Little v. Kellam, 100 Fed. Rep., 353.
Dreydoppel v. Young, 14 Phila., 226.
Croft v. Day, 7 Beav., 84.
Hansen v. Siegel-Cooper Co., 106 Fed., 690.
Stuart v. Stewart Co., 85 Fed., 778.
Cauffman v. Schuler, 123 Fed., 205.
Upper Assam Tea Co. v. Herbert, 7 R. P. C.,
 183.
Seixo v. Provezende, L. R. 1 Ch., 192, 195.
National Water Co. v. O'Connell, 159 Fed., 1001,
 1003.

The imitation of the red Coca-Cola barrels is unfair and enjoinalbe.

- Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720; 211
 Fed., 942.
Hildreth v. D. S. McDonald Co., 164 Mass., 16;
 41 N. E., 56.
Franck v. Frank Chicory Co., 95 Fed., 818.
Cohen v. Delavina, 104 Fed., 946.
Ohio Baking Co. v. National Biscuit Co., 127
 Fed., 116, 121.
R. J. Reynolds Co. v. Allen Tobacco Co., 151
 Fed., 819.
Garrett v. Garrett, 78 Fed., 472.

- Fairbank v. Bell*, 77 Fed., 869, 976.
Kronthal Waters v. Becker, 137 Fed., 649.
N. E. Aul Co. v. Marlboro Co., 168 Mass., 154;
 46 N. E., 386.
National Water Co. v. O'Connell, 159 Fed., 1001;
 161 Fed., 545.
Wright v. Blezard, 27 R. P. C., 299, 303.

The imitation of the visual appearance of Coca-Cola is unfair and enjoined.

- Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720;
 211 Fed., 942.
Hiram Walker & Sons v. Grubman, 222 Fed.,
 478.
Kyle v. Perfection Mattress Co., 127 Ala., 39;
 28 So., 545.
Liggett v. Hynes, 20 Fed., 883.
Rey v. Lecouturier, 27 R. P. C., 268, 278.
Plant v. May Co., 100 Fed., 72, 76.
Bickmore Gall Cure Co. v. Karns, 134 Fed., 833,
 834.
Fonotipia Co. v. Bradley, 171 Fed., 951.
Potter v. McPherson, 21 Hun. N. Y., 539; P. &
 S., 374, 381.
Scriven v. North, 134 Fed., 366, 373.
Howard Dustless Duster Co. v. Carleton, 185
 Fed., 999, 1000.
Sterling Remedy Co. v. Spermine Medical Co.,
 112 Fed., 1000.
Globe Co. v. Brown, 121 Fed., 90.
Rushmore v. Saxon, 158 Fed., 499.
Frost v. Estes, 156 Fed., 677; 176 Fed., 338.
Keystone Type Foundry v. Portland Pub. Co.,
 180 Fed., 301.

Enterprise Manfg. Co. v. Landers, Frary & Clark (C. C. A., Second Circuit), 131 Fed., 240.

Fox v. Glynn, 91 Mass., 344; 78 N. E., 89.

Fox v. Hathaway, 199 Mass., 99; 85 N. E., 417.

Weinstock v. Marks, 109 Cal., 529; 42 Pac., 142.

Buck's Stove Co. v. Kiechle, 76 Fed., 758.

Putnam Nail Co. v. Bennett, 43 Fed., 800.

Jones v. Hallworth, 14 R. P. C., 225.

R. J. Elliott & Co. v. Hodgson, 19 R. P. C., 518.

Allen v. Walton, 178 Fed., 287.

Baldwin v. Greer Bros., 210 Fed., 560.

Flagg v. Holway, 178 Mass., 83; 59 N. E., 667.

Victor Co. v. Armstrong, 132 Fed., 711.

Rushmore v. Manhattan Screw Works, 163 Fed., 939.

Yale & Towne v. Adler, 154 Fed., 37.

Mueller v. McDonaity, 164 Fed., 1001, 1004.

Hegeman v. Hegeman, 8 Daly, 1, 4.

Capewell Co. v. Mooney, 167 Fed., 575; 172 Fed., 826.

Moxie Co. v. Daoust, 206 Fed., 434.

The suggestion that Koke and Dope can be substituted for Coca-Cola is enjoined.

Anargyros v. Egyptian Amasis Cigarette Co., 66 N. Y. S., 626, 627.

Pennsylvania Salt Co. v. Myers, 79 Fed., 87, 88.

Reddaway v. Banham, 13 R. P. C., 218, 224.

Huntley v. Reading Biscuit Co., 10 R. P. C., 277.

The price of Koke and Dope, which is one and the same product, to the dealer is less than Coca-Cola, while the retail price is the same. By giving the distributor

a greater profit a premium is placed on substitution and fraud.

Pillsbury v. Pillsbury, 64 Fed., 841, 849.

Wotherspoon v. Currie, L. R., 5 H. L., 508; 23 L. T. N. S., 443.

Robinson v. Storm, 103 Tenn., 40; 52 S. W., 880, 882.

Sawyer v. Horn, 1 Fed. Rep., 24.

Fairbank v. Bell, 77 Fed. Rep., 869, 877.

Pennsylvania Salt Co. v. Myers, 79 Fed. Rep., 87.

Coats v. Coates Thread Co., 135 Fed. Rep., 177, 179.

Powell v. Birmingham, 13 R. P. C., 258, 263.

Dreydoppel v. Young, 14 Phila., 226.

Fairbank v. Luckel, 102 Fed., 327, 330; P. & S., 423, 425.

The sale by the Koke Companies of their product under the names Koke and Dope places in the hands of dealers an instrument of fraud, with the suggestion conveyed by the use of the Coca-Cola nicknames of passing off as Coca-Cola makes them responsible for the result.

Samuels Bros. v. Hostetter, 118 Fed., 257.

Enoch Morgans Sons v. Whittier Coburn Co., 118 Fed., 657.

Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720.

Hostetter v. Bruggeman-Reinert Distilling Co., 46 Fed., 188.

Hostetter v. Van Vorst, 62 Fed., 600.

Hostetter v. Becker, 73 Fed., 297.

Hostetter v. Sommers, 84 Fed., 333.

Hostetter v. Brunn, 107 Fed., 707.

Hostetter v. Conron, 111 Fed., 737.

III.

The Defenses.

As these cases have progressed, various positions have been assumed by the Koke Companies. As soon as one became untenable it was abandoned and another taken without regard to consistency or candor. The Koke Companies accused in this case of fraud of a singularly mean and discreditable description have defended but have not denied. Indeed few, if any, of the acts of intentional deception of which the Koke Companies stand accused by the testimony in this record, are even explained, much less controverted. The salesmen who counselled dealers to pass off the Koke Companies imitation for Coca-Cola and "no one could tell the difference," though still in the employ of the Koke Companies, were not called as witnesses. The use of genuine Coca-Cola labels as copy for the Koke label is admitted. That there were frequent demands on the part of buyers of soft drinks for Koke and the word Koke was adopted to take advantage of that demand is admitted by Wright, formerly vice president of the Southern Koke Company, Ltd., as the reason for its appropriation, and it is confessed that the word Koke was a nickname for Coca-Cola and known to be such by the promoter of the Koke Companies (Moore) before they were organized and started business.

In view of this situation it is not uncharitable to view with suspicion any defense, short of a denial, which may be interposed.

The principal issue raised by the pleadings is anticipation. It is claimed with respect to Koke that J. C. Mayfield, the alleged predecessor of the Koke Companies, adopted this word as early as 1888 and continuously used it to the present time. This testimony is manufactured.

Mayfield's evidence is designated by the Patent Office as "untrustworthy," and it is stated that he "apparently attached no importance to the fact that he was testifying under oath." Judge Sawtelle and Judge Foster, in finding that there was no use of the word Koke till 1909, by clear inference held Mayfield a perjurer and the defense predicated upon his alleged prior use fabricated. Mayfield is the pretended predecessor of the Koke Companies, an officer of most, and the directing spirit of all of them.

The good faith of any defense offered by the Koke Companies is therefore questionable, to be scrutinized with suspicion and accepted only if established beyond any reasonable doubt.

The defense of right to the use of the names Koke and Dope necessarily results from the claim of the Koke Companies made in their conduct and representations prior to this suit and in their answers, where it is contended that the words Koke and Dope are the trade-marks of the Koke Companies, which they alone are entitled to use.

This assertion was later coupled with the self-destructive position that the words Koke and Dope are generic terms and mean any beverage similar to Coca-Cola and may be used by anybody.

These defenses involve the presentation to the court of two mutually destructive contentions. It is first contended that Koke and Dope mean the Koke Companies' product only and hence are distinctive, and then that these words are generic and describe soft drinks generally.

That the first assertion, a property right in the Koke Companies of the words Koke and Dope, based on prior use and succession is the basis of their business as it

was of their defense is clear. They purchased three Patent Office registrations of alleged trade-marks comprising these words. The Koke Company of America sought to register the word Koke, claiming a use since 1888. The opposition in the Patent Office by the Coca-Cola Company against this application is one of the proceedings in the group of cases in which the record now before this court was used. It is the position assumed in the answer and was the basis of all the Koke Companies' contentions until the fact that it was invented for the purposes of this litigation was demonstrated. Since the showing up of this little excursion into the realm of fiction, this defense has been somewhat in the background and other defenses not so manifestly manufactured, but equally disingenuous have been urged. However, the defense of exclusive right in the Koke Companies in the words Koke and Dope is the defense which the pleadings put in issue and it must be discussed.

(1) The contention that Koke and Dope are the trade-marks of the Koke Companies.

The claim to trade-mark rights in the words Koke and Dope is a double one. With respect to the word Koke it is based upon

(a) Alleged priority of adoption and use by J. C. Mayfield.

(b) Title derived by alleged assignments from

(1) Murfreesboro Bottling Works and

(2) W. L. Bitting of Sherman, Texas.

With respect to the word Dope the claim to trade-mark rights in it is wholly derivative and is based upon an alleged assignment from Houppert and Worcester of Birmingham, Alabama.

(a) **The claim of trade-mark right in Koke by adoption and use.**

This is dependent wholly upon J. C. Mayfield, who claims to have originated this word, and is the source of the Koke Companies' title to it. He swears that he, with other men, was associated with Dr. J. S. Pemberton, the predecessor of The Coca-Cola Company, that Dr. Pemberton disclosed to him the Coca-Cola formula and that he (Mayfield) sold the product under the name Koke from 1888 to the present time.

With respect to the formula, Mayfield testified positively that Dr. Pemberton, in January, 1888, made known the formula for Coca-Cola to him, that Pemberton got his formula book and called it over to him word for word. (Rec., 1608.)

Mayfield is most emphatic. He testified (Rec., 1645, 1646):

“Q. 435. That was the Coca-Cola formula?

A. It was.

Q. 436. You are sure of that?

A. I am.

Q. 437. Absolutely?

A. Absolutely.

Q. 438. No possible mistake about that?

A. No, sir.

Q. 439. Now, you stated that he had made it known to you from a book, did you see this book?

A. I did.

Q. 440. Did you read from it?

A. I did.

Q. 441. What was at the top of the page, if anything?

A. Just Coca-Cola formula.

Q. 442. Just ‘Coca-Cola formula’ was at the top of the page, and he read it off to you?

A. He read it off to me and I copied it.

Q. 443. You made a copy?

A. I made a copy.

Q. 444. In Dr. Pemberton's presence?

A. Yes, sir.

Q. 445. And with his consent?

A. Sure.

Q. 446. There is no possible doubt about that?

A. No, sir."

* * * * *

(Rec., 1646) :

"Q. 462. And you regarded it, and Dr. Pemberton regarded that formula, that Coca-Cola formula as a secret formula?

A. Yes, sir."

At the risk of repetition, it is perhaps well at this point to contrast what Mayfield swears in this case as shown by the foregoing extract, with his testimony in *State v. Rice*. (Rebuttal Exhibit 6.) Here he swore:

"Q. You claim to have got the formula from the Coca-Cola people for the wine coca?

A. No, sir.

Q. Didn't you claim they got it from you?

A. No, sir.

Q. Got it from Pemberton?

A. Yes, sir.

Q. You claim that the Coca-Cola people got Pemberton's formula and you were entitled to it?

A. No, sir, they bought it from Pemberton.

Q. You have been claiming all the time that you had the Coca-Cola formula?

A. Not the Coca-Cola formula."

In this connection too the "Dear Judge letter," written on Jan. 18, 1899, is significant. Mayfield there says: "I got that from the negro that worked for the Coca-Cola Company," and again, "Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta."

The testimony of the witness Mayfield is the keystone of the arch which supports the Koke Companies' whole case. If Mayfield is successfully impeached and his story demonstrated to be false, the whole structure falls. That Mayfield's testimony is not to be relied upon is found

by the Patent Office officials, by Judge Sawtelle and by Judge Foster.

There were produced in corroboration of Mayfield's story his three sons and certain other witnesses, who testified vaguely, from memory only and without the production of anything of a tangible nature, that Koke was used by Mayfield or his companies in which he was interested between 1889 and 1908, at Atlanta, Birmingham, Nashville and St. Louis.

There were produced no books, orders, papers or labels, in fact nothing in documentary form showing any use of the name Koke before 1909. All the testimony is vague and general and when the witnesses were asked to be specific, constant refuge was found in "I don't remember."

Accepting all the statements contained in the testimony of all the witnesses in support of the asserted claim to a trade-mark right in Koke based upon Mayfield's adoption and use, to be true, with only the infirmities inevitably attaching to narratives of facts occurring many years ago and unaided by documentary evidence, and assuming that Mayfield did, as he swears, adopt the word Koke as a trade-mark in conjunction with Dr. Pemberton, Bloodworth and Murphey in 1888 and has used it continuously since, the testimony of A. O. Murphey (called as a witness on behalf of the Koke Companies, Rec., 1277), his associate at that time, demonstrates clearly that the original adoption of the name Koke was a fraud, designed to steal the Coca-Cola business, which Pemberton had previously sold and which of course they knew he had sold. Murphey testified that there was a quarrel at the time when Dr. Pemberton told him and his associates that he had previously sold the Coca-Cola business but (Rec., 1283) Murphey testified that Pemberton

agreed that "He would get us up a substitute which would be identically the same thing under a different name." * * * "We had a discussion about trying to keep the name Coca-Cola." * * * (p. 1284.) "We tacitly and silently went to work to see if we could offset it in some other way." * * * "We * * * agreed on Koke." * * * (p. 1289.) "I cannot say whether the general public at that time had adopted any nicknames for Coca-Cola. I say it is very natural. Perhaps one might be used interchangeably with the other—might be nicknamed for the other. * * *"

"We adopted the name Koke because it was the best way out of the emergency that we could see. We racked our brains to get up something with which we could meet the emergency, and that was the solution. Our idea in meeting the emergency was to still retain the thing that we had bought in some other way if we possibly could, to meet the emergency that was sprung upon us by Dr. Pemberton. He was violating his contract in regard to this particular preparation, and in adopting the name 'Koke' our idea was just such things as would influence a business man in an emergency of that kind. I would not undertake to state that this thing or that thing influenced us to make a move of that kind. This may have been instigated by business interests, such interest, such influence as would control any business man in making a business move in an emergency."*

*This testimony loses some of its point and all of its spontaneity when put in narrative. The questions actually put to the witness and his answers were as follows:

Q. Had Coca-Cola got—had the general public at that time adopted any nicknames for Coca-Cola?

A. Why, I cannot say, Mr. Littleton.

Q. Well, was there—at that time, or before you adopted the name 'Koke' for this product, was this Coca-Cola product known by the name of 'Coca-Cola' or was it popularly and universally known by and recognized by a nickname 'Koke' before you adopted the name 'Koke' for this product?

A. I could not say as to that. I do not remember. Those little details in regard to it, I cannot remember. It is too far back. I would

Assuming that every bit of the foregoing testimony is the literal truth—that Mayfield and his associates started the use of the name Koke as a trade-mark for a beverage made under the Coca-Cola formula in January, 1888, and have used it continuously from that time to this, it is evident that it was a scheme conceived in fraud, that the name Koke was at the date of its adoption an infringement of the Coca-Cola trade-mark, that it was adopted because it was a nickname for Coca-Cola and for the purpose only of stealing the Coca-Cola business which Pemberton had already sold to the predecessors of the Coca-Cola Company. Murphey's testimony discloses the reason for its adoption and brands as fraudulent its use from the beginning. Its subsequent use has been only as an instrument of fraud and deception and to pirate upon the business and good will of the Coca-Cola Company.

not undertake to make a positive statement in regard to a thing of that kind. It may or may not have been. It naturally should be.

Q. Well, naturally should be what?

A. Well, it naturally should be, but I would not like to make a positive statement as to that.

Q. What do you mean by that—it is very natural?

A. I say it is very natural, perhaps one might be used interchangeably with the other—might be nicknamed for the other. If I had been on the road, a salesman, perhaps I might have run against a thing of that kind.

* * * * *

Q. Did you adopt the name 'Koke'—did you gentlemen adopt the name 'Koke' for the fraudulent purpose of making the public think the word 'Koke' was the same word as 'Coca-Cola'?

A. We adopted it because it was the best way out of the emergency that we could see. We racked our brains to get up something with which we could meet the emergency, and that was the solution.

Q. What was your idea in meeting the emergency, what did you have in view?

A. To still retain the thing that we had bought in some other way if we possibly could, to meet the emergency that was sprung upon us by Dr. Pemberton. He was violating his contract in regard to this particular preparation.

Q. Now, in adopting the name 'Koke' did you adopt that and try to get a name as much like that of 'Coca-Cola' as you could, or a different name from it, or what idea did you have in selecting this name 'Koke'?

A. Well, I could not say in regard to this sort of thing, just such things as would influence a business man in an emergency of that kind. I would not undertake to state that this thing or that thing influenced us to make a move of that kind. This may have been instigated by business interests, such interest, such influence as would control any business man in making a business move in the emergency."

In a case where adverse rights were sought to be based upon a use fraudulent in its inception, the Circuit Court of Appeals for the Seventh Circuit in *Raymond v. Royal Baking Powder Co.*, 85 Fed., 231, 235 (Jenkins, J.), in characterizing the defendant's mark, said:

“It was adapted and intended to deceive the public. Under such circumstances no right arises which the law will countenance. Courts do not lend their aid to protect imposition and falsehood.”

The foregoing is on the assumption that Mayfield and his co-swearers were telling the truth when they swore that the word Koke had been used by him and his alleged successors since 1888. It is perfectly plain, however, that this whole narrative is fabricated. Judge Sawtelle found:

“I find as a matter of fact from the evidence * * * that the defendants, Koke Company of America, and its predecessors, did not adopt or make use of the name ‘Koke’ until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff.”

Judge Foster has made the same finding.

The Patent Office held Mayfield's testimony untrustworthy and the majority of his witnesses incredible and that while there might have been some use of the word before 1909, no right adverse to The Coca-Cola Company can be predicated upon it.

In order to see the entire defense in this case in its proper perspective and to appreciate the character of Mayfield and the nature of the trade practices of his companies, associates, licensees and coadjutors, it is desirable to trace somewhat in detail the history of this peculiar individual.

The History of J. C. Mayfield.

J. C. Mayfield has been found by three competent tribunals on the same testimony here before the court to be unworthy of credence. There are, however, in the record facts which do not admit of doubt and there are certain statements made by Mayfield which can perhaps be accepted as true.

Mayfield came to Atlanta, Georgia, and with Murphey, Bloodworth and Pemberton organized a corporation under the name of the Pemberton Medicine Company. This is established by a court record, which is in evidence. The Pemberton Medicine Company, as its name indicates, was a patent medicine concern. Among its products was "Pemberton's French Wine of Coca," "Orange Flower Cough Syrup," "Indian Queen Hair Dye," "Lemon and Orange Elixir," and "Gingerine."

Mayfield devoted a considerable portion of his time to real estate. In 1893 he put upon the market a drink which was called Celery-Cola, the formula of which had been worked out by Pemberton. Later Mayfield left Atlanta and went to Birmingham, where he bought an interest in the Schoolar Vinegar Company and continued to make and sell Celery-Cola in connection with dealings in vinegar, "Hop Jack" or prohibition beer and wines which masqueraded as cider and sherbert for sale in dry territory. He organized a corporation at Birmingham called the Celery-Cola Company. He was also interested there in a company called the J. C. Mayfield Manufacturing Company. There was an interval when Mayfield was in Boston in 1898 and his wife, and her then husband Brown, and S. T. Mayfield (a son) were manufacturing Celery-Cola in Jersey City. There also was a time when Mayfield was making Celery-Cola in Nashville, Tennessee, when he was devoting most of his attention to an oil

scheme. During the fair in St. Louis there was a plant established there and Celery-Cola was made in St. Louis.

Celery-Cola,—possibly drinks called Wine Coca, Pepsinola, Pepoade, Vigo and soda pop were all the soft drinks which Mayfield or any of the companies in which he was interested had made up to 1909. Celery-Cola was the principal product, the others seem to have been ephemeral. In his correspondence with Pogue in 1905 and 1906, particularly Rebuttal Exhibit 12, the phrase occurs, "Celery-Cola is my all."

The Government prosecuted Mayfield and his associates concerning Celery-Cola (*U. S. v. Mayfield*, 177 Fed., 765) and upon conviction of violation of the Food and Drugs Act the affairs of the Celery-Cola Company were wound up; the formula of Celery-Cola was changed, the revised product was rechristened Koke, and Mayfield went to Shreveport, Louisiana, where he organized the Koke Company, Ltd., of Shreveport, in the fall of 1910.

It was in 1909 that Mayfield first began the use of the name Koke. His statements made in his testimony in *State v. Rice*, in evidence here, that in 1907 he was making only Celery-Cola and Pepsinola, and his sworn declarations made to the various Secretaries of State in 1910, when he was attempting to secure registration of the word Koke in the states, that its first use was in June, 1909, may be accepted as true. These statements were made before there was any litigation over Koke and before there was any incentive to falsify, and when the highly imaginative tale which he now tells was not thought of.

After leaving Shreveport Mayfield went to Little Rock, Arkansas, then to Fort Worth, Texas, and in 1911 organized the Koke Company of America and other Koke companies, which took over his pretended rights.

On November 28, 1911, J. C. Mayfield, on behalf of the Koke Company of America, purchased from Christy & Huggins, doing business as the Murfreesboro Bottling Works, registration No. 55878, in the Patent Office, consisting of the word Koke in script. This was later put in interference with an application of W. L. Bitting of Sherman, Texas, to register the word Koke in block type and Mayfield, on behalf of the Koke Company of America, bought Bitting's application which matured into registration Number 94869, paying a substantial sum in each instance. No business or good will was taken over in either case.

It is probable that at this time Mayfield had not thought of swearing back his use of Koke to 1888 because if he had, it is unlikely that he would have bought these registrations. His true purpose in buying them is characterized by Judge Sawtelle:

"I further find that the purchase of the trademark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the fact that the label of plaintiff was copied and imitated and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible."

That it was sometime after the pretended purchase of the Murfreesboro mark (November, 1911) that the present claim of priority was evolved, is clear from the fact that the contract between the Koke Company of America and the Southern Koke Company, Ltd. (Exhibit 174) recites Mayfield's source of title, not as one by adoption and use of the word Koke from 1888, but as derived only by purchase from the Murfreesboro Bot-

ting Works and in his correspondence with Christy & Huggins concerning the Bitting interference, when the question of priority of the use of the word Koke was vital, Mayfield makes no mention of any prior use by him. (See Rebuttal Exhibits 92-100.) Indeed in Exhibit 100 Mayfield, on March 3, 1913, in writing to Christy & Huggins says (referring to Bitting's claimed date of use of 1898), "This party claimed priority to right so I understand." If Mayfield had used the word Koke since 1888, as he now asserts, it is inconceivable that in preparing for that interference he would not have mentioned it to his associates.

From the foregoing it will be seen that there is enough material in the undisputed facts upon which to rear the superstructure of fiction which Mayfield has fabricated. All that it was necessary to do was to add Koke to the list of drinks which he undeniably made and swear it back as far as possible.

That Mayfield's scheme of purloining the good will of the Coca-Cola Company was conceived before 1899, when he was manufacturing and selling only "Celery-Cola," is shown by Murphey's testimony, and the incident related by Mr. Candler (Rec., 385), from which it seems that Mayfield was substituting a drink called Yum Yum for Coca-Cola as far back as 1893.

His piratical intention is evidenced by the certificate alleged to have been given to Mayfield by Mrs. Pemberton. This document, dated August 1, 1899, contains the following statement:

"To my personal knowledge Mr. Mayfield was an expert in the manufacture of both the above commodities long before the present Coca-Cola and Wine Coca Companies were formed, and he has been at the head of the manufacturing department of one or the other of these companies ever since their organization."

This certificate contains a statement which Mayfield has never had the hardihood to contend is the truth. In fact, Mayfield admits its falsity. (Rec., 2426.)

He never had any connection directly or indirectly with the Coca-Cola Company and was never at the head of the manufacturing department or had anything to do with it. He does not assert that he ever was.

The "dear Judge letter" is further evidence that he did not know the formula and was trying in every way to find out how to make Coca-Cola. This precious document (the writing of which Mayfield admits) is printed in full later.

It is further shown in one of the Pogue letters, admittedly written by Mayfield in 1905 (Rebuttal Exhibit No. 28), that Celery Cola was habitually and to Mayfield's knowledge substituted for Coca-Cola. He says:

"The druggists there would buy anything just as quick as they would 'Celery-Cola,' for they substitute for Coca-Cola anyway largely."

The Coca-Cola Company contends and Judge Sawtelle and Judge Foster both found that there never was any use whatever of the word Koke by Mayfield until June 1, 1909. There can be no doubt of the correctness of this conclusion. We have Mayfield's positive statement in *State v. Rice* that he was not using it in 1907. On Dec. 15, 1905, he wrote to Pogue "Celery-Cola is my all." (Exhibit 12.) We have his statements six times repeated in his affidavits for state registration that the first use was June 1, 1909. (Rebuttal Exhibits 84, 85, 86, 87, 88, 89.) We have the fact of his purchase of the Murfreesboro and Bitting marks for substantial considerations, which is wholly inconsistent with the idea of superior title or prior right in Mayfield. We have the source of the title of Mayfield in the contract between the Koke Company of

America and the Southern Koke Company, Ltd., alleged to be based on this purchase and not on any prior use.

Against these facts is the inherently incredible story of Mayfield and his co-swearers, discredited and disbelieved by three courts, unsupported by anything of a tangible character, coupled with Mayfield's proved perjury, and his successful impeachment as a witness.

The Koke Companies have wholly failed to sustain the burden placed upon them of justifying their fraud, and in this connection it may be suggested that those who are guilty of the conduct of which they admit themselves to be guilty are not likely to hesitate at fabricating a defense to escape the penalties of their wrongdoing.

Comments on the Testimony of J. C. Mayfield.

It is plain from a perusal of Mayfield's testimony in this case and a comparison of it with the testimony that he gave in *State v. Rice* in 1907 (Rebuttal Exhibits 4 and 5), and in view of the repeated declarations he made under oath in connection with the registration of the name Koke in the various states (Rebuttal Exhibits 84-89), that Mayfield's story that he used the name Koke before 1909 is pure invention.

The following are parallels of a few of Mayfield's most glaring contradictions which we believe demonstrate him to be a deliberate falsifier.

Judges Sawtelle and Foster inferentially, and the Examiner of Interferences expressly, found him unworthy of belief.

J. C. Mayfield, testifying in this case in New Orleans on March 10, 1915, said (Rec., 1683) :

"Q. 1328. Do you know of a Mr. Rice of Memphis, Tennessee?

A. I have heard of him.

Q. 1329. Do you know him?

A. Yes, sir.

Q. 1330. Did he work for you?

A. Yes, for a while.

Q. 1331. Was not there some claim that he took your formula away with him?

A. Yes, sir.

Q. 1332. Was he prosecuted for that?

A. Yes, sir.

Q. 1333. He started that with your formula?

A. I do not know.

Q. 1334. But he was prosecuted?

A. I do not know, only about the case.

Q. 1335. *You were not there at the hearing?*

A. *No, sir.*

Mayfield's attention was called to this statement, and he was confronted with a transcript of his testimony in *State v. Rice*, at Chattanooga on July 5, 1915, and he was asked (Rec., 2409) :

You testified to that effect at New Orleans, did you not?

A. *If I said, no, sir, it was a mistake. I said, yes, sir.*

Q. 5. This is your testimony, taken at New Orleans, reported by the Commissioner on behalf of the defendants?

A. I don't know about the typographical work there; I was there, of course.

Q. 6. *You say that is a typographical error?*

A. *A typographical error.*

Q. 7. *And that you did not say, "No, sir"; you said yes, sir?*

A. *I said, yes, sir.*

Q. 8. And that Mr. Fain, the Commissioner, appointed on behalf of the defendants, made a mistake; is that it?

A. They must have made it; it is a mistake.

Q. 9. You were there?

A. I was there; yes, sir.

Q. 10. Did you testify in that Rice case?

A. I did.

Q. 11. You were sworn in that case, were you not?

A. I suppose so.

The record itself demonstrates that the "typographical error" is an impudent fabrication. If the witness had stated that he was present at the hearing, of course, the next question would have been "did you not testify in that case." The subject certainly would not have been dropped.

It is not surprising that Mayfield hoped to conceal his connection with *State v. Rice*. He was present at the

trial and testified. His testimony there (a transcript of which is in evidence as Rebuttal Exhibits 4 and 5) is utterly at variance with his claims here. After this transcript was offered and in response to repeated requests of counsel for The Coca-Cola Company, Mayfield was put back on the stand and attempted to explain the discrepancies between his two sworn statements. He admitted the correctness of the transcript of his testimony in *State v. Rice* and then naively stated that he "evaded in a way," as he calls it, the questions put to him in the course of that trial and attempted to explain how he came to do it. Instead of helping matters he succeeded, by his attempted explanations, in making the contradictions only the more apparent, for his "explanations" contradict not only his own previous testimony, but that of his son, S. T. Mayfield, and of many of the witnesses who had sworn in his behalf. For example:

Mayfield testified here, in March, 1915, that he got the Coca-Cola formula from Dr. Pemberton in 1888.

In 1899 he wrote the "Dear Judge" letter, in which he states that he got what he knew of it from a negro that worked for The Coca-Cola Company and certain things from Brooks, the old Coca-Cola drummer.

He testified in *State v. Rice*, in 1907, that he did not have the Coca-Cola formula and did not claim it, but that The Coca-Cola Company bought it from Pemberton.

He then attempts, in July, 1915, to explain his testimony in *State v. Rice*, by swearing that his wife was in the court room while he was testifying, that she had been trying to get the Coca-Cola formula from him and that he "evaded" when he said that he did not have it, forgetting apparently that he had testified in March, 1915, in this case, that his wife knew the Koke formula, which he claims is the same as

the Coca-Cola formula, and that his son, S. T. Mayfield, had testified that his mother, the same woman from whom Mayfield says he was trying in 1907 to conceal the Koke formula, was making Koke in 1895 or 1896 with a man named John McCowan.

This series of contradictions is so ludicrous and seems so incredible that the actual testimony is here paralleled so that the court can see for itself what a mess this man has got himself into. The italics are ours.

COLUMN 1.

Mayfield's testimony in this case at New Orleans, March 10, 1915 (Rec., 1608):

Q. 49. Now, was the formula for making Coca-Cola made known by Dr. Pemberton to the members of that partnership at that time?

A. It was to me.

Q. 50. Now, explain, did he just tell you what the formula was, or how was that, how did he make it known to you?

A. He got his formula book and called it over to me word for word before we left the Marietta Street place, before the contract—oh, well, anyhow, it might have been after, but he was in bed sick and we thought we ought to have it, you know; we were looking after things and we had paid in our money and I think he sent for me and I went up to his sick bed and he had the formula book and I brought me a book and I copied everything word for word as he give it out, with complete instructions.

Q. 51. What—*was the formula for Coca-Cola copied by you at that time?*

A. *It was.*

Q. 52. What became of that book, Mr. Mayfield?

A. I do not know what ever did become of it, that book. It may have been I was—I reckon it was a little book, anyhow, I had copies of it, complete copies either on a book or paper.

* * * *

COLUMN 2.

Extracts from Mayfield testimony in *State v. Rice*, at Birmingham, Ala., in 1907. (Rebuttal Ex. 4, 5, pp. 51, 52.)

Parker House, Boston,

June 18, 1899.

My Dear Judge:

I have just completed my experimenting with coca extract. I have perfected everything. Now, listen, our original formula called for just twice the amount of coca extract that we are now using. I kept cutting it down to make the flavor more pleasant. It did not call for glycerine. I put that in to eliminate the bitter from the coca extract. *I got that from the negro that worked for Coca-Cola Company.* The Coca-Cola Company extracted the leaves so they could hold up the quantity of extract, I now have. I read an article from a German chemist and *Brooks, the old Coca-Cola drummer, told me some things last winter just before I left Atlanta.* You do know that it is the coca extract and caffeine that does the work. All the trade who have been cutting the goods, that is, mixing simple syrup with it, say wine coca would not stand as much. It will now. So I will show you just how to use the glycerine with the leaves while I am with you Sunday and Monday. I want you to use two and a half gallons of the extract you are now making instead of 1 1-4. Measure out the 2 1-2 gallons extract, put it in a 5-gallon keg and put 2 gal-

COLUMN 3.

Mayfield's attempted explanation at Chattanooga, July 15, 1915 (Rec., 2419) :

I was in hopes we would get through with this lawsuit without dragging through the graveyard, disturbing the dead, and I so far have evaded it, but since you brought up that letter I have to explain. This Dear Judge was the husband of my first wife. I will state, however, that she secured a divorce from me in Atlanta, legally. The court gave me the children, and I did the best I could to raise them and educate them and bring them up. My wife was demented. All our family physicians told me so, but at times she had rational intervals, and at those times she was very grasping, making money, and the fact that I bought out the Coca-Cola business while she was my wife she thought she was entitled to a copy of the Coca-Cola formula, notwithstanding the fact that she made with her attorney a final settlement that was satisfactory. *This letter was written several years after our divorce. She demanded of me a copy of that formula.* I put her off with one excuse after another. At this time my son and I had a little business in Jersey City. She went to his place of business—I had no objection—because my son was her son. I was over there once or twice, and *she realized the value of the Coca-Cola formula—or the Koke formula, which was the same,* and that if she could get a certificate from me she would be able to make considerable money by selling this formula. I put her off with one excuse after another, that I had misplaced the formula—lost it, here, yonder or some place else—and that I

COLUMN 4.

Mayfield testified in New Orleans in this case on March 10, 1915 (Rec., 1679) :

"Q. 1298. I want to ask you if your first wife became Mrs. Diva Brown afterwards?

A. Yes, sir.

Q. 1299. And Mrs. Diva Brown was around the plant in Atlanta, Georgia, she was Mrs. Mayfield at that time, and was around the plant in Atlanta, Georgia, was she not when you first started to manufacture?

A. No, sir, she was not there in 1888.

Q. 1300. When did she start coming around the plant as I understand?

A. Well, she started when I went back there in 1903.

Q. 1301. 1903?

A. I mean 1893.

Q. 1302. Well, did you go away from Atlanta before 1893?

A. I sent my wife away from there, and children, back to Roanoke, Alabama. My family were only there for a little while, the children in school. It was a cheaper place to live and after she got well they came back.

Q. 1303. In 1893?

A. She was not around the place, nobody ever seen her around there during the first business there, 1888 or 1889.

Q. 1304. Did she help manufacture around the plant at all?

A. *She may have helped a little around with my son and Mr. Bloodworth when we went back there. I think she did, in '93 up to '94 or '95, along there.*

Q. 1305. Was she familiar with this formula that you got from Doctor Pemberton?

A. Well, I could not answer that,

COLUMN 1.

(Rec., 1645) :

"Q. 433. You stated, Mr. Mayfield, on your direct examination that *Doctor J. S. Pemberton made known the formula for Koke or Coca-Cola to me*, he got his formula book and called it over to me word for word; when was that?

A. That was in *January*, just after he had signed the contract.

Q. 434. Of what year?

A. Of 1888.

Q. 435. *That was the Coca-Cola formula?*

A. It was.

Q. 436. *You are sure of that?*

A. I am.

Q. 437. *Absolutely?*

A. *Absolutely.*

Q. 438. *No possible mistake about that?*

A. *No, sir.*

Q. 439. Now, you stated that he made it known to you from a book, did you see this book?

A. I did.

Q. 440. Did you read from it?

A. I did.

Q. 441. What was at the top of the page, if anything?

A. Just Coca-Cola formula.

Q. 442. *Just "Coca-Cola formula" was at the top of the page, and he read it off to you?*

A. *He read it off to me and I copied it.*

Q. 443. *You made a copy?*

A. *I made a copy.*

Q. 444. In Doctor Pemberton's presence?

A. Yes, sir.

Q. 445. And with his consent?

A. Sure.

Q. 446. *There is no possible doubt about that?*

A. *No, sir."*

* * * *

(Rec., 1646) :

"Q. 462. And you regarded it, and

COLUMN 2.

lons glycerine with it in same keg, shake it three or four times a day. You can use it in six hours after thus treating it. If the glycerine eliminates the bitter, which it does, you can see how much more effective it can do the work in close contact. It's still better to use a certain per cent. with the leaves in mixing them that I will show you. Now change your formula to 2 1-2 gallons instead of 1 1-4; use 2 gallons of glycerine instead of 5, it will not change the cost of the compound nor the flavor one bit, and gives it a more exhilarating drink. Every man in the office here this morning was carried away with the improvement. I will make some flavoring for you Monday so you can see. Have alcohol, leaves, glycerine, Lime C. P. I will go and buy the oils Monday morning. *We have now the original formula and Coca-Cola exactly;* buy 12 lbs. confectionaries and sugar, extra quality, dissolve it with 1 gallon boiling water so I can make some tests Monday. *I will have some 'Coca-Cola' and 'Wine Coca' with me. I am 'tickled to death' at being able to get back to the original formula and make it identical 'Coca-Cola.'* Have everything ready and we will start operations Saturday morning.

Your friend,

JACK."

The foregoing is a letter Mayfield admitted writing and is a part of the record in *State v. Rice*. He testified further (pp. 63, 64) :

Q. *You claim to have got the formula from the Coca-Cola people for the wine coca?*

A. *No, sir.*

Q. *Didn't you claim they got it from you?*

COLUMN 3.

would get it. I wrote her and wrote Brown several letters along that line, but so very anxious was she to get it she came to Boston. I do not know, but I believe, when I wrote this letter in question that she was there. I gave it to her. She came there for it. As I said before, she was demented. *I wrote that letter, and I wanted to make it ring with a genuine ring*, so that she and Judge Brown, who was her lawyer—her husband, he was a lawyer of course, he was a judge,—and she went back satisfied with that letter. I had put her off, as before stated, with other excuses. I promised in that letter to be in Jersey City, or New York, on Monday. I was not there, and did not go. If I had gone, and given her a copy of my formula, and taught her and Brown how to make Koke,—Coca-Cola,—this letter and Mrs. Brown would never have appeared in the Rice case; but I did not go, because it was practically my all. I came on back home. I realized what I was up against—a woman who was demented and determined to have a copy of this formula—and being the mother of my children, naturally I thought and planned every way possible to get around giving her what she wanted without wounding her feelings. About the same time I received a letter from my father, that one of my children was sick, so I left Boston. I did not go to New York, or to Jersey City, nor did I comply with my instructions in that letter. I came on to Atlanta, and then to Birmingham, because I did not do what I promised to do, *she appeared in this Rice case, for no other reason in the world except to*

COLUMN 4.

she had opportunities helping around there to get familiar with it, and what a wife would have with a husband's business."

S. T. Mayfield swears (Rec., 1458):

"My mother and John McCowan made Koke."

This was in 1895 or 1896 (Rec., 1458.)

COLUMN 1.

Doctor Pemberton regarded that formula, that Coca-Cola formula as a secret formula?

A. Yes, sir."

COLUMN 2.

A. No, sir.

Q. Got it from Pemberton?

A. Yes, sir.

Q. You claim that the Coca-Cola people got Pemberton's formula and you were entitled to it?

A. No, sir; they bought it from Pemberton.

Q. You had been claiming all the time that you had the Coca-Cola formula?

A. Not the Coca-Cola formula.

Q. Have you not been advertising that you had the formula for the drink the Coca-Cola people claimed?*

A. I may have said I manufactured the stuff—

Q. Didn't you say that you as a chemist of the J. C. Mayfield Company had years of experience in making Coca-Cola?

A. I manufactured it before they bought it from Pemberton.

Q. And you claim that the present Coca-Cola people bought it from Pemberton after you made it?

(63) A. I made the impression that I was an experienced manufacturer.

Q. And knew how to make it?

A. I was experienced in the making of soda fountain beverages.

Q. Don't you advertise that you know how to make and do make Coca-Cola?

A. I don't make it. I advertise the letter that Dr. Pemberton's wife gave me that I was once associated with her husband in the manufacture of Coca-Cola.

*The Mrs. Pemberton certificate is no doubt what is referred to. (See Rebuttal Exhibit 10.)

COLUMN 3.

get all she could from me relative to this formula. She had no interest in the case, and she was there, and it was her questions largely that I answered. Of course, she propounded them through the attorney. The attorney did not know anything about all those oils and all those things—she, in a measure, did—that is what she was after. She had possibly a superficial knowledge of the formula, but she wanted facts, the proportional parts, and by being there she hoped to get them. I evaded in a way a great many of her questions—those which did not apply to the case at issue. I had the city physician, of Birmingham, Ala., to be present at this trial and he was there. I told him what I had to contend with, and he said he would be present, and he noticed her condition. As before stated, the case at issue had no bearing on a great many of these questions, and as she had demanded a copy of the Coca-Cola formula, or the Koke formula, and I had told her and Judge Brown that I had lost it, or misplaced it, she was there to get all the information she could. Of course, I had not lost it, and I had not misplaced it, because I was making Koke in Jersey City at that time from the original Coca-Cola formula—I do not mean I was making Koke in Jersey City, at the time of the Rice trial, I am talking about in Jersey City, when I wrote this letter, and she was in Boston, demanding of me a copy of that formula, and a certificate from me that it was the original Coca-Cola formula. I would not give it but evaded her and put her off with the excuse

COLUMN 4.

COLUMN 1.

COLUMN 2.

Q. And knew how to make it before the present Coca-Cola people got the formula?

A. I think she stated that to me.

COLUMN 3.

that I had lost it in order to get rid of what I—which was true—a woman that was not at herself. I was trying to protect my property and my life. She had threatened my life and in fact had attempted it two or three times.

* * * *

(p. 2436) :

A. Well, I hate to explain it, but I will. *Mrs. Brown, the mother of my children, was propounding these questions through the attorney on the other side.* I had told her often and often that I had lost the Coca-Cola formula, which is the Koke formula, you might say. She was after all the information she could get about the Koke formula, or the Coca-Cola formula. *I had evaded giving it to her in every way possible.* She stated in some of her advertisements and things that she had the original Coca-Cola formula. This letter addressed to Judge Brown, was written eleven years after Dr. Pemberton's death. If I had given her the copy of the formula, if I had gone to Jersey City and taught her how to make it, she would not have appeared in this case, but not having it, not being able to sell the formula as she wanted to, she appeared in this case and sought all the information possible, and *that is why those questions were asked.* *I evaded them along that line because they were immaterial and did not have any bearing on the case at issue.* *As before stated, my property was at stake, and that is why I answered those questions along there as I did.* At the time of this trial, April 19, 1907, she had not a satisfactory formula. She did, however, after that,

COLUMN 4.

COLUMN 1.

COLUMN 2.

COLUMN 3.

in some manner, get a satisfactory formula, or rather a formula—I do not know that it is a satisfactory formula—but a formula that made a good cola beverage.—I know she got a lot of it in this particular trial, and as Rice had stolen my Celery Cola formula I have reasons to believe that Rice gave her a copy of the celery cola formula.

COLUMN 4.

If, when Mayfield was testifying in *State v. Rice*, his wife knew the formula, as S. T. Mayfield swears she did, Mayfield's excuse for testifying falsely—that he was trying to conceal it from her—is a complete failure. If it be objected that S. T. Mayfield is mistaken and cannot know what his mother knew, it is a simple matter to arrive at the same result by another route.

Concerning the transaction which resulted in the alleged purchase of the Dope trade-mark from Houppert and Worcester of Birmingham, S. T. Mayfield testified that Houppert and Worcester disclosed a formula to him, that this was the formula under which Houppert and Worcester had been making the drink which they sold as Dope, and that this was the same as the Koke formula.

He swears (Rec., 1464):

“Q. 105. Was the formula for making that Dope made known to you at the time of making this purchase?”

A. Yes, sir.

Q. 106. How did that formula compare with the formula for making Koke?

A. Well, practically the same thing; it was the same; there might have been some little minor detail as to some ingredient, but I did not notice it if it was. Of course, I knew the formula for making Koke, and have it in my head and I have had for a long, long time.”

The answer to the amended bill in this case contains the following (Rec., 195):

“In about the year 1903, P. L. Houppert and Samuel H. Worcester, of Birmingham, Alabama, partners, doing business under the firm name and style of ‘Houppert & Worcester,’ having acquired a knowledge of the formula from which respondents’ predecessors in title had theretofore manufactured their extract, syrup and beverage known as ‘Koke,’ began to manufacture, market and sell, in interstate commerce, an extract, syrup, and beverage, which were substantially identical with the extract, syrup and beverage theretofore manufactured and sold under the name of ‘Koke,’ by respondents’ predecessors in title, and substantially identical with that which the respondents are now manufacturing and selling under the name of ‘Dope.’ ”

The witness, Campbell, who was connected with Houppert and Worcester, testified that the Dope formula was obtained by them in 1907 from Mrs. J. C. Mayfield. (Rec., 1373.)

Therefore, since the Koke and Dope formulas are the same and Mrs. J. C. Mayfield in 1907 knew and sold the Dope formula, she must then have known the Koke formula. But Mayfield swears that in 1907 in *State v. Rice* he testified as he did to conceal it from her.

First Use of Koke.

J. C. Mayfield testified in this case at New Orleans on March 10, 1915, that he and the Koke Company of America, as his assignee, have continuously used the word Koke as a trade-mark since 1888, and that it was sold in receptacles labelled or stencilled with the name “Koke” during all that time. (Rec., 1616, 1617.)

In his applications made in September of the year 1910 to register Koke as a trade-mark in various states

the date of the first use of Koke is sworn by Mayfield to have been June 1, 1909.

In his application to register Koke in the State of New York (Rebuttal Exhibit 84) he swore:

“The same has been in use by applicant since June 1, 1909.”

In his application to register “Koke” as a trade-mark in Indiana (Rebuttal Exhibit 85) he swore:

“Length of time, if any, during which the trade-mark ‘Koke’ has been in use—since June 1, 1909.”

In his application to register Koke as a trade-mark in Massachusetts (Rebuttal Exhibit 86) he swore:

“Length of time during which the trade-mark has been in use—since June 1, 1909.”

In his application to register Koke as a trade-mark in Nebraska (Rebuttal Exhibit 87) he swore:

“The said trade-mark or label has been in use since June 1, 1909, and consists of the arbitrarily selected mark or character herewith illustrated ‘Koke’ (trade-mark).”

In his application to register Koke as a trade-mark in California (Rebuttal Exhibit 88) he swore:

“This trade-mark consists ‘Koke a beverage.’ This trade-mark has been used in its business since the first day of June, 1909.”

In his application to register Koke as a trade-mark in Pennsylvania (Rebuttal Exhibit 89) he swore:

“The trade-mark consists of the word ‘Koke,’ the length of time, if any, during which it has been in use fourteen months.” (This application is dated Sept. 16, 1910.)

These applications purported to be made by the Koke Company of Shreveport, Louisiana, but Mayfield says (Rec., 1632):

“They were my trade-marks and my business

and I just took them out in the name of the company.”

Mayfield's explanation that he was referring to the adoption of a particular barrel label when he made these affidavits is ridiculous.

The applications clearly refer to the word Koke, not to any particular label, and the Pennsylvania affidavit (Rebuttal Exhibit 89) explicitly recites that “The trade-mark consists of the word ‘Koke.’ ”

The same statement occurs in the Massachusetts application (Rebuttal Exhibit 86).

The transfers of these state registrations from the Koke Company, Limited, of Shreveport, back to J. C. Mayfield, all describe the mark, not as a particular label, but “the trade-mark ‘Koke.’ ” (See Defendants' Exhibit 156.)

The date of use given in these applications (June 1, 1909) was not the date of the organization of the Koke Company, Limited, of Shreveport. This corporation Mayfield swears was organized in the fall of 1910 (Rec., 1673), about the time these affidavits were made, so that the date, June 1, 1909, must refer to Mayfield's individual use and is when he adopted and first began to use the word Koke.

Manufacture of Koke in Birmingham and Nashville.

J. C. Mayfield testified in this case in New Orleans on March 10, 1915 (Rec., 1665) :

"Q. 919. I will get to that, the J. C. Mayfield Manufacturing Company was on 20th street, this bottling—they were bottling what?

A. They bottled everything I was then introducing, all of my different flavors.

Q. 920. They bottle Koke?

A. Koke, Celery Cola, Vigo, Pepsi-Nola, and all the soda water flavors."

Again he says (Rec., 1685) :

"XQ. 1371. You state positively that during the time you were in Nashville the *J. C. Mayfield Manufacturing Company* manufactured Koke?

A. Yes, they manufactured Koke."

In *State v. Rice* at Birmingham in 1907 he said (Rebuttal Ex. 4, 5, pp. 7, 8, 25, 26) :

I am president of the J. C. Mayfield Manufacturing Company. It was organized about five years ago. It is still doing business. They are doing nothing now, except supplying the Celery-Cola Company with their goods. They have contracts with the Celery-Cola Company on their specialties, Celery Cola and Pepsinola.

* * * *

Q. *Mr. Mayfield, what does your company manufacture besides this Celery Cola?*

The state objects to the question.

The Court: Answer the question.

A. *That is all they do.*

Q. Does this Celery Cola Company manufacture anything except Celery Cola?

A. *They do other business, but don't manufacture anything else except these two drinks.*

However, at Chattanooga, on July 5, 1915, Mayfield swears (Rec., 2423), that "Celery-Cola" and "Pepsi-Nola" were the only two things the J. C. Mayfield Manufacturing Company had just at that time; that he individually had the Koke formula, and then in almost the same breath he contradicts himself by saying (Rec., 2431) that "Celery-Cola" and "Pepsi-Nola" were what the Celery-Cola Company manufactured. They had a license from the Mayfield Manufacturing Company to manufacture these two specialties. And again (Rec., 2431) he puts a third version on the situation when he says :

"I manufactured all the stuff, not only 'Celery-Cola' and 'Pepsi-Nola,' and manufactured 'Koke.'"

S. T. Mayfield, on the other hand, swears (Rec., 1460) that the company manufactured and sold Koke and Celery-Cola and Pepsi-Nola, extracts and syrups.

And again (Rec., 1478) he swears:

“XQ. 440. What did the J. C. Mayfield Manufacturing Company continue to manufacture?

A. They continued to manufacture ‘Celery-Cola,’ ‘Koke’ and ‘Pepsi-Nola,’ just as in Nashville.”

J. W. Mayfield says (Rec., 1536) that during the time the J. C. Mayfield Manufacturing Company was doing business there, they were making “Koke” and “Celery-Cola” and “Pepsi-Nola.”

And again he says (Rec., 1545) that the Celery-Cola Company was operating down there (Birmingham), manufacturing Koke.

The Rebuttal Exhibits 11 and 55, have among them letterheads of the J. C. Mayfield Manufacturing Company, and Celery-Cola Company, which announce “Manufacturers of Mayfield’s Extracts.”

In short, the truth of the matter is that the J. C. Mayfield Manufacturing Company and the Celery-Cola Company were putting out two drinks, “Celery-Cola” and “Pepsi-Nola.” For the purposes of this case Koke has been since added.

There were produced by the Coca-Cola Company in rebuttal a large number of employes of the Celery-Cola Company and J. C. Mayfield Manufacturing Company who testified that they never had heard of any product called Koke being made by either of these companies. A large number of letterheads and advertisements of the Celery-Cola Company and J. C. Mayfield Manufacturing Company were produced by the witness Pogue, an ex-employe of these companies, in response to a *subpoena duces tecum*. None of these showed the name

Koke. Then Mayfield, to get himself out of the hole that he had got himself into, swears that it was not his companies that made Koke, but that he personally made it, forgetting apparently that his two sons had previously testified that the companies had made it.

Reasons for Adopting Koke.

A. O. Murphey (Rec., 1277), testifying first, admits that when he says the word Koke was adopted, it was known as a nickname for Coca-Cola (page 1289):

“I cannot say whether the general public at that time had adapted any nicknames for Coca Cola. I say it is very natural, perhaps one might be used interchangeably with the other—might be nicknamed for the other. * * * We adopted the name Koke because it was the best way out of the emergency that we could see.”

This witness' idea of meeting the emergency was to “retain the thing that we thought we had bought,” namely, Coca-Cola, “in some other way.” In short the name was selected because it would enable them to pirate the Coca-Cola business.

Of course Mayfield had to make good on this so swore manfully when he was afterward called.

He says (Rec., 1613):

“At that time I had never heard of Koke, we adopted it on account of its being new and a coined word, that is it, that is an easy word, short. It was something new, the others had never heard of it.”

Formula.

Mayfield, in July, 1915, says (Rec., 2427):

“Q. 751. Did anybody else know the formula for Celery-Cola?

A. No, sir.

Q. 752. Did anybody else know how to mix the syrups up?”

In explanation he states that there are two formulas, one is a scientific formula, making the extracts, the flavoring. The other is a mixing, a manufacturing formula. (Rec., 2428.)

“Q. 754. Did anybody besides yourself know the mixing formula?

A. Yes, sir; my sons knew the mixing formula, but they did not know the scientific end of it.”

Bearing in mind that the scientific end is making the extracts, Mayfield forgot that he had already testified in March, 1915. (Rec., 1660):

“Q. 817. * * * your son, Mr. Steve Mayfield, remained at Nashville and did some manufacturing, manufactured these extracts, both Koke and Celery-Cola?

A. Yes, sir.”

And again he testified (Rec., 1667):

“Q. 994. You made Koke flavoring and Celery-Cola?

A. Yes, sir.

Q. 995. And you are the only one that made that up to the Van Deusen time?

A. Well, my boys made it.”

S. T. Mayfield also testified (Rec., 1464):

“Of course I knew the formula for making Koke and have it in my head, and I have had for a long, long time.”

In Rebuttal Exhibit 20, Mayfield writes to Pogue saying:

“S. T. Mayfield made Celery-Cola ten years ago. It was he who made my goods in New York while I was on the road. He manufactured C. C. while I was in the oil field.”

Advertising of Koke.

Much is said about the extensive advertising by the Koke Companies. Mayfield produces some futurist specimens, which purport to have been issued by the South-

ern Koke Company and others, though the financial statement in the prospectus of the Southern Koke Company says nothing about any advertising expense. (Exhibit 169.)

It costs money to advertise and either Mayfield is wrong in his testimony or the prospectus is wrong in its facts. Either the Koke Companies were swelling the profits of the concern with a view to selling stock to possible investors or Mayfield's testimony and the samples of advertising he produced were concocted for the purposes of this litigation. The latter is probably the truth, in view of other significant facts.

Mayfield testified (Rec., 1692) that he bought considerable Koke advertising from the Meek and Beach Company.

In rebuttal plaintiff called Ernest Higgin (Rec., 2067) and Henry Hartman (Rec., 2070), both connected with the Meek and Beach Company, who testified that they never at any time furnished any advertising to anybody with the word Koke on it, but they do remember furnishing Celery-Cola advertising.

Mayfield stated to George H. Wilkins (Rec., 866):

"I am not going to do any advertising for Koke."

Moore, the salesman of the Koke Company of Texas said to J. M. Penland, President of the Waco Drug Company, whom he was trying to induce to handle Koke, that the Koke Company was in position to give a lower price than Coca-Cola

"because they were not doing any advertising, that the average person who called for Coca-Cola used the word 'Coke,' and that they would get the benefit of the advertising done by the Coca-Cola Company." (Rec., 1979.)

This is confirmed by the conversation between G. H. McLean, advertising solicitor of the Dallas News and

J. G. Van Winkle, secretary of the Koke Company of Texas. McLean called to solicit advertising (Rec., 730):

“I met Mr. Van Winkle and at that time it was my intention to solicit him for a card for the jobbers and manufacturers’ trade and we discussed advertising for a few minutes and Mr. Van Winkle told me that the Koke Company of Texas was not doing any advertising. He said they couldn’t afford to advertise from the fact that they were selling, I believe he said, ‘Koke’—I don’t know if he mentioned the brand or not, it seems to me like it was ‘Koke,’ it may have been some other name—but that it was the same formula as ‘Coca-Cola’ and said that the ‘Coca-Cola’ people were advertising and it was generally known as ‘Koke’; that is a large percentage of people would call for ‘coke,’ and if the fountains were supplied with ‘Koke’ they could furnish him with this product and sell it or distribute it in that way. I believe that was the main reason. I didn’t have any argument to offset that, consequently I never called on him any more.”

Manufacture of Koke in St. Louis and Nashville.

Mayfield testified (Rec., 1595):

“I went to St. Louis to see if I could not organize a company there. It was a bottling company. * * * Maybe I stayed there until 1900, sometime in 1900. Then I went from there to Nashville. I was all the time making Celery-Cola and Koke.”

M. J. Handley (Rec., 1989) testified that he was president of the Tennessee Carbonating Supply Company, which had a contract with the J. C. Mayfield Manufacturing Company and bought their products, namely, Celery-Cola and Pepsi-Nola, and that he never heard of the J. C. Mayfield Manufacturing Company handling, advertising, selling or disposing of or dispensing in any way of anything under the name of Koke.

The Coca-Cola Company called in rebuttal Norville N. Leaver, who was salesman for Mayfield’s St. Louis

companies (Rec., 2035), who stated that he was connected with those companies in 1903 and 1904 as city salesman; that the only things they made were Celery-Cola and Pepo-ade and that he had never heard of Koke and never sold any, and John H. Bohne (Rec., 2041), the chemist who worked for the St. Louis concerns during 1903 and 1904 manufacturing all the products they put out. He also never heard of any Koke.

Koke in Birmingham and the Labels Used There.

One of the most curious masses of contradictions that this record, with all its richness in that respect, discloses, is the Birmingham situation. Mayfield and his sons testified that they were making Koke in Birmingham.

According to their statements the Celery-Cola Company did make Koke and did not make Koke—the J. C. Mayfield Company did make Koke and did not make Koke—that Mayfield personally made Koke—that none of them bottled Koke and that all of them bottled Koke; and that it was all labeled—upon this last they are unanimous.

In rebuttal a large number of ex-employees of Mayfield and his companies were put on the stand by The Coca-Cola Company. They were disinterested men and women of every class of employment, stenographers, bookkeepers, clerks, traveling salesmen, bottlers and draymen, and these people, without exception, testified that they never heard of any product made by Mayfield, the J. C. Mayfield Manufacturing Company or the Celery-Cola Company called or labeled or sold as Koke during this period. They all, however, remember Celery-Cola distinctly.

The names of these witnesses and the pages of the

record where their testimony may be found are: S. A. Ellis (1842), L. M. Barelift (1844), D. E. Moody (1881), B. U. Hopper (1891), W. M. Smith (1893), J. T. Ensley (1900), Thomas Dickson (1906), Homer Brewer (1911), Tom Anderson (1913), George E. Anderson (1917), Mack Crawford (1921), Walter Thomas (1922), Miss N. L. Bonham (1924), Will Barrow (1925), John L. Bevell (1930), W. J. Garrett (1984), Melville Rice (1986), and Mrs. Rufus H. Page (2073).

Charles J. Pogue was employed at Birmingham by the J. C. Mayfield Mfg. Co. in 1904 and was with that company and the Celery-Cola Company until the fall of 1906. (Rec., 1858.) This was the time during which Mayfield and his companies claim to have made Koke in large quantities, and it was the time when the witnesses at Birmingham, who were called on behalf of the Koke Companies, testified that they had purchased Koke in receptacles so marked. Pogue was Mayfield's intimate friend and confidential man. While the testimony of the Koke Companies was being taken at Birmingham, Pogue was engaged in rounding up and interviewing witnesses who would undertake to testify in their behalf in this case that the J. C. Mayfield Mfg. Company and the Celery-Cola Company made and sold a drink labeled Koke in Birmingham. Pogue was subpoenaed by us and put on the stand. He first insisted on making a statement (Rec., 1854), saying:

"I want to make a statement. I was summoned by the Commissioner the last time that they were taking evidence here, to examine some witnesses for the other side to this case, and, being associated with Mr. Mayfield, I naturally talked to some of them, and I don't think it's really fair myself, to the other side, to allow me to testify in this case. I make that as a claim of personal privilege for myself.

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I began work for the J. C. Mayfield Manufacturing Company in the early part of 1904, and I was with that company and with the Celery-Cola Company until the fall of 1906, I guess it was.

* * * *

(Rec., 1861.) You ask if, during the entire time I was connected with the J. C. Mayfield Manufacturing Company, the Celery-Cola Company here in Birmingham, or the Celery-Cola Company in Missouri, any or either of these concerns made, manufactured, sold, advertised, handled, dealt in or had any advertising matter for, any product with the name of 'Koke'—'K-o-k-e?' Well, I was out on the road some, as I stated, and I can't answer that question. You ask if they ever made, manufactured, sold, advertised, or had any labels, containers, barrels, kegs, or anything else with 'K-o-k-e' on it, as far as I know, at any one of the places, or any of the companies, that I have enumerated heretofore; well, of my own knowledge, I refuse to answer that question—I don't—the position I was in—well, I don't want to answer that question."

If there was such a thing as Koke made by Mayfield or his companies at Birmingham, of course Pogue would have known of it. Why did he not want to answer? If he told the truth and said that there was no such thing as Koke, he would convict his friend and associate Mayfield of perjury and also the witnesses whose testimony he himself had procured. If he had said that there was such a thing as Koke he would have perjured himself, which he was unwilling to do, so he refused to answer, which is a perfectly transparent way of saying that Koke was a myth.

It was, therefore, up to Mr. Mayfield to explain the testimony of his former employes who, though they were about the plant all the time, had never heard of Koke and he did it, in entirely characteristic fashion. (Rec., 2453.) He swears that the draymen and the people about the establishment would not be likely to know what was in

the bottles because the bottles were placed in cases that were stenciled "Celery-Cola."

It was, he explained, "none of their business. And that is where it impressed upon these negroes that they were handling Celery-Cola; if they left out a bottle, the bottle had Celery-Cola, the case had Celery-Cola, stenciled or printed on the side." "The negroes who washed the bottles had Celery-Cola before them from morning till night and the bottler who bottled the goods had Celery-Cola before him." The bottles and cases had Celery-Cola on them and "those negroes thought that everything that went into the cases was Celery-Cola." (Rec., 2454.)

In other words, the people who actually handled the bottles could not tell whether they contained Koke or not, but would be likely to think that it was Celery-Cola because the bottles had Celery-Cola on them.

How does this match with the great particularity with which the Birmingham witnesses offered by the Koke Companies testified about "the little white label with 'Koke' on it in black letters"?

R. J. Baker (Rec., 1302, 1304):

"Koke in black letters he had on it, on the bottles, the bottles had labels on them, the shape of those labels was just on a square paper, and had block letters K-O-K-E."

B. P. McGraw (Rec., 1314) testifying about receiving Koke in 1905 and 1906, says that he got printed Koke labels "about as wide as my two fingers."

W. F. Neal testified (Rec., 1329) that Koke had just a plain label with Koke on it, in black letters, in block type.

Mrs. M. L. Edwards testified (Rec., 1337) that the bottles had a label "hardly as wide as my two fingers." A white label with black letters "K-O-K-E."

H. O. Adams (Rec., 1343) testified that the bottles had a label with "Koke" in black block letters.

E. D. Montgomery (Rec., 1357) testified that at Birmingham they had a small square label, with the word "Koke" in large, black block letters.

A. F. Watkins testified (Rec., 1381) that the "Koke" on the labels was in block letters.

John Smith testified (Rec., 1390) that the bottles had a small label with Koke on it.

C. N. Baker testified (Rec., 1408) that he used Koke labels sent to him by Mayfield. The labels were "as broad as your two fingers."

The truth of this mass of contradictions is accidentally and inadvertently let out by Mayfield. A man named Smith was put on the stand in Birmingham in rebuttal (Rec., 1894.) He met Mayfield on the street and Mayfield said to him:

" 'We are having court up here at the Tutwiler Hotel, I want you to come up there, maybe you can do me some good; We are bottling a drink called "Koke," and I know you have seen the stuff that we bottle, all you have to do is go up there and tell them we have been bottling that stuff.' He handed me a little slip with 'Koke' printed on it."

Providentially the witness preserved the slip and it is in evidence as Exhibit 66. It is illustrated on the opposite page. It will be noticed that it is white, it is about the size that the other witnesses who, no doubt, got these slips in the same way, testified that the Koke labels were. It has "Koke" on it in black block letters. It is about as wide as two fingers.

Even Mayfield did not have the hardihood to go on the stand and identify this slip as one of the labels he used. He said that all his labels were burned up in a fire.

KOKE

In the United States District Court for the
District of Arizona.

The Coca-Cola Company
- Vs -

The Koke Company of America, Et Al.

In the United States District Court for the
Eastern District of Louisiana, Northern Division.

The Coca-Cola Company
- Vs -

Southern Koke Company, Ltd., Et Al.

The Coca-Cola Company
- Vs -

The Koke Company of America

In the United States District Court for the
Northern District of Texas, Dallas Division.

The Coca-Cola Company
- Vs -

The Koke Company of Texas, Et Al.

In the United States District Court for the
Eastern District of Missouri, Eastern Division.

The Coca-Cola Company
- Vs -

J. H. Van Duesen, Et Al.

Opposition No. 1424.

In The United States Patent Office.

Rebuttal
Plaintiff's Exhibit No.

66

offered in

evidence at

Birmingham Ala.

June 1

1915

Witness

W. M. Smith

J. N. Pettibone

Commissioner:

Record Page No.

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Mayfield admits that he had a conversation with Smith and does not deny giving him the slip and made no explanation whatever concerning it. He denies giving a slip to Bevell, but he had not been accused of that. Besides he says that Bevell, who is a white man, is a negro. (Rec., 2451.) This episode perhaps explains the remarkable unanimity with which the Birmingham witnesses testify that Mayfield's product was labeled K-o-k-e in block letters on a white slip of paper.

The net result is that Mayfield, after procuring a large number of witnesses to swear concerning an alleged label which he evidently devised for the occasion, now gives them all the lie by testifying that the product was in Celery-Cola bottles, in Celery-Cola cases, and that even the draymen and bottlers could not tell whether it was Koke or Celery-Cola, but would naturally think it was all Celery-Cola.

Of course they thought it was all Celery-Cola.

It *was* all Celery-Cola.

“Celery Cola” Is What Was Made Up To 1909.

Mayfield's contention here is that Koke and Coca-Cola are the same (Rec., 1614), and that Koke and Celery-Cola are entirely different.

In his testimony given at Chattanooga on July 5, 1915 (Rec., 2435-2436), he said that Celery-Cola is not made by the same formula as Koke, there is no celery, no prune juice in Koke, and Celery-Cola had more coca leaves in it.

In his testimony in *State v. Rice* in 1907 he said (Exhibit 4, p. 65) that Celery-Cola differs from Coca-Cola because there are celery and other things in Celery-Cola, and Celery-Cola is more exhilarating. This was perhaps

due to the strychnine there was in it. (See Rebuttal Exhibits 12 and 13.)

S. T. Mayfield says (Rec., 1459), that the only difference between Koke and Celery-Cola is that celery extract was added to Celery-Cola.

J. W. Mayfield testified (Rec., 1543-4) that there was a little difference between Celery-Cola and Koke, that Celery-Cola had a little bit of celery in it.

George H. Wilkins (Rec., 878) was told by Van Deusen, who compounds the Koke Companies' product, that:

"About six years ago Mr. J. C. Mayfield came to me and gave me a formula and said he had had more or less trouble with it and asked what I could do with it. I looked it over carefully and told him I thought I could make a good extract out of it. Mr. Mayfield said 'All right, go ahead, I have had so much trouble with it I want to get somebody to put a lot of care and attention to it.' "

And again (Rec., 880):

"I asked Mr. Van Deusen if that was the only place this was sold. He said, 'No, I sell some to the Brewing Company in Danville and Richmond. There it is called Celery-Cola and it is practically the same formula except there is a little more celery added to it.' "

As to the origin of the Celery-Cola formula Mayfield testified in *State v. Rice* (Rebuttal Ex. 5):

"Q. Are you the original discoverer or inventor of those?

A. Yes, sir, in connection with my former partner.

Q. Who was your partner?

A. Old Dr. Pemberton, who is now dead.

* * * * *

Q. When did you first commence using these formulas, Mr. Mayfield?

A. I commenced in a small way about eighteen years ago.

Q. What formula did you write first?

A. It has been this same Celery-Cola formula.

Q. Celery-Cola eighteen years ago?

A. About that time.

Q. Was it called Celery-Cola then?

A. I think so. I got it out, first cola compound made in an extract form.

* * * * *

(11) Q. Where did you get this formula from?

A. I, in connection with Dr. Pemberton, originated that formula after months of experience, testing and getting it down.

Q. Experience in what?

A. Experience in testing, making a good many tests.

Q. Had you ever been employed by any of the Cola people in Atlanta or Georgia, anywhere?

(The State objects to the question, and the Court overrules the objection.)

A. Never by the Coca-Cola people.

* * * * *

Q. That was the first formula, you say, that you made?

A. Yes, sir.

Q. And you made that when?

(12) A. That has been about eighteen years ago.

Q. You and Dr. Pemberton?

A. Yes, sir."

* * * * *

J. C. Mayfield, in this record, speaking of the Koke formula (Rec., 1646), said:

"We do not use the extract of coca. There is now no form of the coca leaf connected with the drink at all. The cocaine is left out and we added something in lieu thereof, that has practically the same flavor as the coca leaf. We added Imperial China tea, flavoring extract. That is the only change. Outside of those two changes there is absolutely no change from the formula that Dr. Pemberton handed over to me in January, 1888."

This change was made after the passage of the Food and Drugs Act of 1906 and must have been in 1908 or '9 (Rec., 2436). Mayfield says:

"I have always adhered to the Koke formula un-

til the passage of the Pure Food Law, when I modified it a little bit so as to comply with that law.”

It is very evident that if Mayfield got anything from Dr. Pemberton, he got a formula for Celery-Cola, and that Celery-Cola was the only drink of this character that he made, up to the time he got into the difficulty with the Government for violation of the pure food law, in 1908 or 1909. (*U. S. v. Mayfield*, 177 Fed., 765.) He states that at that time he made a change in the formula of Koke. (Rec., 2436.) Why should he have made a change in the formula of Koke? The prosecution brought against him concerned Celery-Cola, not Koke. Koke was not involved. The change that Mayfield claims was made, was the change in the Celery-Cola formula, by eliminating the celery, if there ever was any celery in it, and the coca leaves. The name Celery-Cola was abandoned and the product so revised, was, in 1909, christened Koke.

Mayfield himself lets the cat out of the bag, on page 2414 of the Record, where he says:

“The Coca-Cola Company or somebody gave me a black eye with Celery-Cola. It was dragged through the express company, the wholesale company and drug company of New Orleans, and I put the name *Koke*—I was having these names registered in the states. I was kind of afraid of the Federal law, don’t you see?”

Put the name Koke—of course, put the name Koke on his revised Celery-Cola and used it in 1909 for the first time as he swears in his applications for state registrations that he did.

There is no necessity of making any further comparisons or of pointing out the many other contradictions in Mayfield’s testimony and of the many discrepancies between his statement and the statements of his co-swearers. If the foregoing is not enough to brand the claim of Mayfield’s prior use an impudent fiction, nothing can.

And this, under the rule announced by the Supreme Court in *Deering v. Winona Harvester Works*, 155 U. S., 286-300, discredits the whole defense in this proceeding.

If, as seems clear to a demonstration that Mayfield has admitted that there was no use of the word Koke by him or his companies until 1909, no amount of testimony of people who say that they bought it of him or his companies or saw packages labeled Koke by them before 1909 can possibly be true.

That Mayfield's testimony is false and the story that he tells concerning his alleged use of Koke prior to 1909 is fabricated is clear from the foregoing.

Judge Sawtelle in his opinion states:

"I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendant, Koke Company of America, and its predecessors did not adopt or make use of the name 'Koke' until the year 1909, and the use of said name by said defendant and its predecessors was not sufficient to create any right to its use as against the plaintiff." *Parker v. Stebler*, 177 Fed., 210, 9th Circuit; *The Barbed Wire Patent*, 143 U. S., 275; *Deering against Winona Harvester Works*, 155 U. S., 286.

Judge Sawtelle has held (and Judge Foster came to the same conclusion) that there was no use of the word Koke prior to 1909, and it would seem from an examination of the foregoing comparisons that this conclusion must be reached. Such is the inevitable logic of the facts. The minute Mayfield admits—as he has by his testimony, in *State v. Rice*, that he was not using the word Koke in 1907, and his repeated declarations under oath, in his appli-

cations to register the word Koke in the states, that its first use was in 1909, no amount of testimony of people who say that they bought it of him, or his companies, or saw packages labeled Koke before 1909 can possibly be true. This is the rule announced by this court in *Parker v. Stebler*, 177 Fed., 210, 212. The position is very clearly taken by the Court of Appeals of the District of Columbia in *Alexander v. Blackman*, 26 App. D. C., 541; 1906, C. D., 602, where Mr. Justice Duell said:

“Unless we can credit Alexander’s testimony we cannot credit that of his witnesses. His testimony is the cornerstone of the arch and if it falls the testimony of the others falls with it. We do not mean to say that his uncorroborated testimony as to prior possession of the invention would be sufficient. Rather, if his story is untrue the testimony of the others amounts to nothing, and they have either testified falsely, or have been persuaded into believing that the dates he gives are the correct ones, when, as a matter of fact, they are mistaken as to dates and have been led into very grave errors, to put it mildly.”

The rule firmly established in patent cases that proof of prior use of the invention must be certain beyond a reasonable doubt, applies with double force in a case such as this.

W. A. Gaines v. Rock Springs Distillery Co.,
226 Fed., 531.

Barbed Wire Patent, 143 U. S., 275, 284.

Telephone Cases, 22 Fed., 309; 25 Fed., 725; 126
U. S., 1-565.

Dodge v. Post, 76 Fed., 807.

In this case Mayfield is unable to produce a single label, advertisement, price list, billhead, order blank or any printed or written matter whatsoever bearing the word Koke which dates before 1909. He claims to have manufactured his goods under the name Koke first in

Atlanta, then at Birmingham, then in Nashville, then in St. Louis and then in Shreveport.

Mayfield has produced in support of his assertions his three sons, who corroborate his statements, and a number of people connected in some way with him by bonds of interest or friendship, and some other who testify very indefinitely either to purchases of Koke from Mayfield or his companies, or to seeing receptacles labeled Koke at some place occupied by them. None of these witnesses is able to produce a single piece of documentary evidence or a label, bill, letter or anything bearing the name Koke and pretend to testify solely from memory.

It is the rule of all the authorities that oral testimony is not sufficient to discharge the burden of proof imposed on one claiming anticipation.

Deering v. Winona Harvester Works, 155 U. S., 286.

Parker v. Stebler, 177 Fed., 210.

H. Mueller Mfg. Co. v. Glauber (C. C. A., 7th Circuit), 184 Fed., 609, 618.

Mast, Foos & Co. v. Dempster Mill Mfg. Co. (C. C. A., 8th Circuit), 82 Fed., 327.

National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed., 693 (C. C. A., 8th Circuit).

Bowers v. San Francisco Bridge Co., 91 Fed., 381, 408.

Torrey v. Hancock, 184 Fed., 61, 67.

Kraatz v. Tieman, 79 Fed., 322, 323.

Underwood Typewriter Co. v. Elliott-Fisher Co., 165 Fed., 927.

Beckwith v. Malleable Iron Co., 174 Fed., 1001.

United Shirt & Collar Co. v. Beattie, 149 Fed., 736.

Merrimack Mattress Co. v. Brown, 122 Fed., 87.

Timolat v. Philadelphia Pneumatic Tool Co.,
123 Fed., 899; 131 Fed., 257.

Albright v. Langfeld, 131 Fed., 473.

Kansas City Hay Press Co. v. Devol, 81 Fed., 726.

Untermeyer v. Freund, 58 Fed., 205.

Mack v. Optical Co., 52 Fed., 819.

Flomerfelt v. Newwitter, 88 Fed., 696.

Moore on Facts, Sec. 46 and cases cited in notes
174, 175, 176, 177 and 178.

The non-production of specimens of a product alleged to be made in great quantities is always a suspicious circumstance.

Brooks v. Sacks, 81 Fed., 402 (C. C. A., Third Circuit).

Celluloid Mfg. Co. v. Russell, 37 Fed., 676, 678.

American Bell Tel. Co. v. Molecular Tel. Co.,
32 Fed., 214, 220.

On the assumption that all of the witnesses who testified to having seen or purchased Koke honestly believed that they testified truthfully, it should always be borne in mind that the human memory is a fickle thing, especially as to unimportant matters and dates. Judge Dean, speaking for the Supreme Court of Pennsylvania, in *Miller v. Cohen*, 173 Pa. St., 488, 34 At., 219, 220, said:

“No one with opportunity for observation of judicial proceedings has failed to notice the lamentable infirmity of human recollection.”

Pettibone v. Pennsylvania Steel Co., 133 Fed.,
730, 735.

The alleged facts testified to in this case are more or less remote. Professor James in his “Principles of Psychology,” Volume 1, page 670, observes:

“Other things being equal, at all times of life recency promotes memory.”

Courts never repose implicit confidence in statements of witnesses regarding remote transactions. This is particularly so where dates are important.

Moore on Facts, Sec. 749.

Russell v. Baptist Theological Union, 73 Ill., 337, 340.

Wing v. Richardson, Fed. Cas., 17,869.

In Re Williams, Fed. Cas., 17,709.

An interesting discussion on fallability of memory for dates and times is found in *Moore on Facts*, Sec. 845.

In addition to the inevitable and inherent inaccuracy of human memory with respect to dates and times, where it can be shown that the matter concerning which the witness is testifying is of no particular importance to him at the time of his alleged observation of it and was one to which he would not be likely to pay special attention, his testimony is little short of worthless because attention and observation are conditions precedent to any recollection at all.

See James, *Psychology*, Vol. 1, pp. 403-427; *Moore on Facts*, Sec. 767, for an elaborate discussion.

Kraatz v. Tieman, 79 Fed., 322, 323.

Mack v. Spencer Optical Co., 52 Fed., 819.

In this case the witnesses produced to prove use of Koke by Mayfield were many of them related to him by blood, friendship or interest and were evidently carefully tutored.

“Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information”

said Mr. Justice Brown in the *Barbed Wire Patent*, 143 U. S., 275, 284.

Hershey v. Blakesley, 33 Fed., 922, 924.

Moore on Facts, Sec. 815.

Mayfield's fanciful tale of part ownership in Coca-Cola and knowledge of the formula derived from Dr. Pemberton, even if the violent presumption is entertained that it is not deliberately perjured, can be explained by Lord Romilly's statement in *Pierce v. Bradley*, 23 Beav., 64, 71; 53 Full Reprint, 25, 28:

"It frequently happens that a person, by long dwelling on a subject, thinks that a thing may have happened, and he at last comes to believe that it actually did occur."

This is particularly true where a piece of property has enormously increased in value. In *Russell v. Miller*, 26 Mich., 1, 16, Judge Campbell remarked:

"This tendency is so familiar that we can put little reliance on the acts or statements made after the value has begun to increase."

There have already been cited a number of cases having to do with the telephone patents. It is a matter of common knowledge that after Bell's invention in 1876 a large number of persons appeared who claimed to have invented the same thing many years before, and fortified their claims literally by clouds of witnesses, who testified, with apparent sincerity, that they had seen, used and talked over an operative telephone in the '50s and the '60s and long prior to Bell's invention. Drawbaugh's claim was supported by the testimony of five hundred such witnesses.

American Bell Telephone Co. v. People's Telephone Co., 22 Fed., 309.

American Bell Telephone Co. v. American Cushman Telephone Co., 35 Fed., 734.

Moore on Facts, Sec. 1049.

And it is quite possible to say that there is no necessity of imputing perjury to some of the people who testify that they saw receptacles labeled Koke about Mayfield's

place of business or purchased Koke from him or his companies from time to time. The testimony is unsatisfactory and may properly be ignored, because it attempts to establish by memory alone, remote facts exciting no particular attention at the time of their occurrence.

With regard, however, to the testimony of J. C. Mayfield and his three sons, the case is different. These men testify unanimously and with great positiveness to a constant, continuous and extensive use of the word Koke as a trade-mark for a beverage from 1888 to the present time. Their testimony is evidently concerted. They profess to rely on memory alone. They produce nothing of documentary character dating before 1909, not a scrap of paper, not a book entry, not a label, not an advertisement, not a letter—nothing on which the word Koke appears in any manner or form.

Everything of the sort, they testified, was lost or had been destroyed. At this same time a man named Pogue was engaged by them in rounding up such witnesses as were willing to swear for them. (Rec., 1862.) He had been an employe of Mayfield's Birmingham establishment. Pogue was served by us with a *subpoena duces tecum*, issued under an order of the District Court at Birmingham, Alabama. In response to this subpoena he produced more than a hundred letters which had been in his possession all the time, written to him by Mayfield on the stationery of the J. C. Mayfield Manufacturing Company and the Celery-Cola Company during the time when he swore he was selling Koke in great quantities. *In not one of these letters and on not a single letterhead does the word Koke appear.*

Pogue testified (Rec., 1864):

"I haven't any idea in the world how many letters, papers and things I think I have examined. I imag-

ine it is a hundred or more. I noticed the printed matter on the letters or documents as I was running through. No, sir, the name 'Koke'—'K-o-k-e' did not appear on a single solitary one of them.

(Page 1876:)

No, sir, there is not a single letter that I have examined that has got the name 'Koke'—'K-o-k-e' on it, or in it. That includes those I have identified for this record and those I have examined here, but which have not been put into this record."

The letters are detailed and intimate, they mention other drinks, but not Koke. The query is pertinent why did not Mayfield produce them—they certainly were in existence, and he must have known of them because he and Pogue were at that very time together, working up the testimony in this case. (A portion of those letters are in evidence as Rebuttal Exhibits 11 to 60.)

These letters throw an interesting sidelight on the character of the man Mayfield and are highly material on his credibility. They are intimate documents, written to his business associate and reveal the man as he is. They show him to be a visionary and dishonest schemer, an illiterate and a person without morals or character.

In addition, the witness Bevell, who was interviewed by Mayfield, was later called on behalf of The Coca-Cola Company and produced advertising matter and order books used during the period of alleged use of Koke, but the word Koke nowhere appears.

Mayfield and his sons cannot be excused, as can their co-swearers, on the ground of honest mistake. It is the testimony of J. C. Mayfield which must be scrutinized.

The three sons are simply swearing in corroboration of their father, and if J. C. Mayfield testified falsely, necessarily the sons do.

Attention has already been called to the glaring inconsistencies in their testimony. It is appropriate here to point out that this case is one where there is a peculiar temptation to perjury. The stake is large. The alleged events on which Mayfield's adverse claim is based are remote. Many of the actors in it are dead and with respect to many of the circumstances it would be impossible to contradict any statement Mayfield might choose to make. As Mr. Justice Brown stated in *The Barbed Wire Patent*, 143 U. S., 275:

"The situation opens wide and dangerously the door to perjury and the fabrication of the evidence.
* * * One may easily conceive of instances in which to support a case of prior conception of an invention evidence that it would be impossible to meet or discredit might be falsely devised."

In the general situation in this case there is enough of a foundation on which to rear a superstructure of falsehood. Dr. Pemberton concededly was the inventor of Coca-Cola and its first manufacturer, and J. C. Mayfield concededly was at one time associated with him and has been for years in the business of manufacturing proprietary articles, among other things, soft drinks. It is stated in *Moore on Facts*, Sec. 1055:

"It is probably within the experience of every trial lawyer and of every judge that willing witnesses, and even corrupt ones, unless they are phenomenal falsifiers, have a foundation of fact upon which they build their fabrications, and that their fabrications are apt to consist of distortions of the actual facts. It arises therefore out of the very nature of perjury that it must be confirmed to a certain extent."

It will be noticed that Mayfield's testimony contains in abundance those things which to the experienced man are earmarks of perjury. There is a copiousness of detail concerning circumstances which are incapable of contradiction, but there is a remarkable economy of de-

tail concerning those things which can be investigated and contradicted.

The language of Mr. Justice Grier of the Supreme Court in *Luco v. United States*, 64 U. S., 515, 535, is suggestive:

“Where the facts sworn to are capable of contradiction, they may be proved by others not to be true; and when they are not, the internal evidence is often more convincing than any other. A shrewd witness, who is swearing falsely to something which cannot be disproved by direct testimony, will confine his recollection wholly to that single fact, professing a want of recollection of all the facts and circumstances attending it. An inexperienced witness whose willingness to oblige his friend exceeds his judgment will endeavor to give verisimilitude to his tale by a recital of imaginary circumstances. A stringent cross-examination will generally involve the latter in a web of contradictions, which will be in a measure evaded by the other, with the answer that he ‘does not recollect.’ ”

The most casual examination of the testimony of all the Mayfields shows that there is copiously present this earmark of falsehood. They all testify that Koke was made in large quantities and bore labels and was sold generally. They can produce no label. They cannot recollect and they cannot name a single customer who ever bought any. “I do not remember” is the invariable answer of all of them when asked to be specific. S. T. Mayfield made this answer one hundred and forty-six times in the course of his cross-examination and the other Mayfields are equally noncommittal. This in itself is enough to discredit their testimony entirely, apart from contradictions to which attention has been called, and which we believe show them all to be guilty of willful and corrupt perjury.

It is evident from the record in this case that J. C. Mayfield has endeavored to repeat the performance of

which he was guilty in the suit in St. Louis between his company and the Celery-Cola Company.

In that case one of Mayfield's Companies got into litigation over the trade-mark "Celery-Cola." The defense was made that the complainant did not come into equity with clean hands because, it was asserted that the product contained no celery and did contain deleterious ingredients, namely, strychnine and cocaine. Mayfield evidently sought counsel's advice and got it in a letter which may mildly be characterized as an indiscretion.

This letter (Rebuttal Exhibit 13), which is here reproduced, was transmitted by Mayfield to Pogue, and demonstrates that the manufacture of evidence is no novelty with this individual.

McGill Building 6/1/20
 SPECIALTY:—PATENTS, TRADE-MARKS, COPYRIGHTS.

13

F. T. F. JOHNSON,

ATTORNEY-AT-LAW,

McGill Building.

WASHINGTON, D. C., May 1, 1920. 100 5.

J. C. Griffith, Esq.,

Birmingham, Ala.

Dear Sir:—

Your favor of the 29th inst., received and contents partially told, also the letter of your St. Louis attorney.

It is absolutely necessary that your key be a "Trade-Mark" should contain a long salery and hole, and the fact that it contains additional ingredients greatly strengthens your case. Even if your mixture should contain New Mexico I cannot see that this would affect the case in the least. It is true that New Mexico is a poison, as are all other drugs, but it is also true that it is one of the best and most effective ingredients of "tonics" usually prescribed by physicians. The fact that your beverage contains poison should not affect your trade-mark rights, but in view of the fact now that is now going around the country concerning beverages and their ingredients, I would advise that any analysis that you may have made of your beverage should fail to show the presence of that drug. I would, therefore, advise that you take up a vat of your beverage including the quantity of salery and leaving out the cocaine. Then take samples of the beverage from this vat and keep them analyzed. Always be sure to label yourself, and have one of your key-keepers, whose business it is to handle the goods take the samples from this vat, so that he can be put on the stand as a witness and testify when the samples were taken from the vat or tanks from which the beverage sold to the trade was taken.

Now see from such very positively that your beverage contains long salery and hole, and that in addition to that the it contains 15 or 18 other ingredients. It would be well to give the name of four or five of the other ingredients. As I do not know that the ingredients are a secret which you should want, but your chemist can probably advise you on that point. It is neither necessary nor advisable to send all of the ingredients, and if the formula is a trade-mark no Court would accept you to divide it. If, however, any of the ingredients to be used in the beverage comes to form a chemical combination a Court

W. T. F. Johnson 9/1/15.
SPECIALTY - PATENTS, TRADE-MARKS, COPYRIGHTS.

F. T. F. JOHNSON,

ATTORNEY-AT-LAW,

McCall Building.

L. C. Wayfield-----2.

WASHINGTON, D. C.,190

most such drug, and the composition so formed (provided that such composition is not a harmful one). This matter should be gone over very carefully before your testimony is given.

Hervey W. Wiley is the name of the Chemist of the Agricultural Department, and his address is 1814 10th. Street, N.W., Washington, D.C.

The Certificate of Registration that I sent you some time ago will show the date (1902) that Mr. Wayfield commenced to use the Mark. However, I herewith inclose a carbon copy of the Statement made by Mr. Wayfield as to the use of the trade-mark.

The trade-mark "Celery-Cola" indicates to the purchaser that the beverage contains, among other ingredients, Celery and Cola, and I am, therefore, of the opinion that any analysis that will show, or rather fail to develop either celery, or cola, or rather both of them, would prove fatal to your case, as the mark would be held to be deceptive, and you would in all probability be thrown out of Court on the grounds that you were deceiving the public. Therefore you must prove beyond doubt that both Celery and cola are present in the beverage, and you must not fail to bring out the fact that there are other ingredients in the mixture.

As I have not seen a copy of your bill against the Celery Cola Co. nor a copy of their answer thereto, I am unable to advise you any further than I have above.

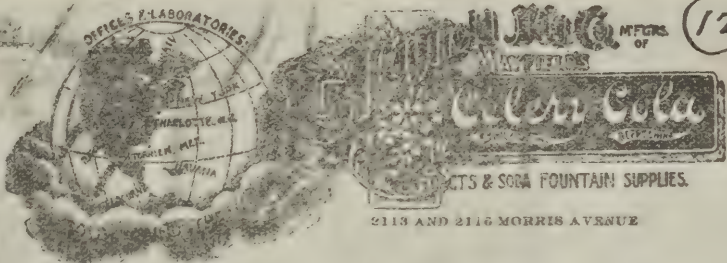
I can give my attendance and assistance at the trial on January 3rd at St. Louis, if such is the wish of Mr. Anderson and yourself. If you wish me to do so St. Louis you will please send me an amount sufficient to cover my expenses to and from St. Louis, and my expenses while in that city.

I herewith return the letter from Mr. Anderson to you.

Very truly yours,

F. T. F. Johnson

N. B. In the meantime I will look up the law covering this case, as directed. *F. T. F. Johnson*



12

BOTH PHONES 823

BIRMINGHAM, ALA., DEC. 1, 1911.

Dear Sir:

I am extremely glad to hear of your success. The only thing I can suggest is that I personally inspect the shipping of your goods, as I have not yet had any experience to Exeter or any other place. I am sure I will get it all of promptly.

Enclosed find a letter from your ally, Mr. W. H. Jones, Jr., of the firm that carries the trade mark (I am not sure of having been associated with Mr. Jones - it is a little expensive, but we get the best of it). For the sake of the company, I am sure you will find it important that we should be able to get the best of it. I am sure this will be a great help to you.

Yours very truly,

Polina - I think we ought to mention 3
4 other things - we could mention Vanilla
extract & "Tea" Coffee. I am sure
I am sure you will find it important that we should be able to get the best of it.

The box of C. G. shipped today is marked
so that you may know this is the box
for your new goods. I am sure you will find it important that we should be able to get the best of it.

could multiply but they are all in small quantities

This past history is illuminative of Mayfield's disposition and has a distinct bearing on the credibility of his story in this case.

"This unconscionable act on the part of this witness goes far in my estimation to create doubts as to his integrity and, of course, operates to throw doubt upon his truthfulness."

Blodgett, J., in *Smith v. Davis*, 34 Fed., 783, 785.

"Of course, those who would commit such a fraud would swear falsely to carry it through. If their positive testimony to the honesty of the transaction is overborn by badges and indicia of fraud, deduced from their own testimony, the conclusion must be that there was fraud."

Mr. Justice Blatchford in *In re Goodridge*, Fed. Cas. 5547, p. 614.

The demonstrated perjury of Mayfield himself and the highly suspicious character of the testimony of his co-swearers in this case indicate a repetition here of the reprehensible conduct clearly shown to have occurred in other litigation to which he was a party.

In addition to discrediting the guilty parties as individuals and rendering them unworthy of belief, the fabrication by a party to litigation of a cause of action or a defense is the strongest admission by conduct that no real cause of action or defense exists.

As was stated by Lord Cockburn in *Moriarity v. London, Chatham & Dover R. Co.*, L. R. 5 Q. B., 314, 22 L. T. (N. S.), 163, 166:

"The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense taken, if he is defendant, is an honest and just one; * * * here, if you can show that a man has been suborning false testimony and has endeavored to have recourse to perjury, it is strong to

show that he knew perfectly well that his cause was an unrighteous one; * * *."

In *Baltimore & Ohio R. R. Co. v. Rambo*, 59 Fed., 75 (Circuit Court of Appeals, Sixth Circuit), Judge Taft remarked:

"It is quite true that it was competent for the plaintiff to introduce evidence in rebuttal, tending to show that the authorized agent of the Baltimore & Ohio Railroad Company had been engaged in suborning witnesses to testify falsely. Such evidence was relevant on the main issue as tending to show an admission by its conduct that it had a bad case, needing false and perjured evidence to support it."

The Supreme Court of the United States has announced a similar rule in *Deering v. Winona Harvester Works*, 155 U. S., 286, 300. It appeared that certain doubtful testimony had been secured by an agent of a concern which was interested in defeating the patent in suit. Mr. Justice Brown said:

"This entire evidence, taken in connection with certain damaging admissions made by Heller as to the compensation he received, both for his testimony in this case and for his concealment of certain facts in relation to another patent, throws discredit upon the whole case made by the defendant with respect to the anticipation of the Stewart patent."

The general flavor that conduct of this sort gives to the side of a case guilty of it is well summed up by Chief Justice Bigelow in *Egan v. Bowker*, 5 Allen (Mass.), 449, 452:

"The inference is a reasonable and proper one, that a person having an honest and fair debt which he claims to be due will not endeavor to support it by falsehood and fraud; and the fact that he resorts to such means of proof has a tendency to show that he knows he cannot maintain his suit by evidence derived from pure and incorrupt sources. Truth does not ally itself with falsehood, but falsehood will

often endeavor to make it appear that truth is on its side.”

Bennett v. Susser, 191 Mass., 329; 77 N. E. Rep., 884.

Moore on Facts, Sec. 589, 590.

People v. Arnold, 43 Mich., 303; 5 N. W., 385.

Van Voorhis v. Van Voorhis, 94 Mich., 60; 53 N. W., 964.

Georgia R. Co. v. Lybrend, 99 Ga., 421, 435; 27 S. E., 794, 798.

Richardson v. State, 90 Md., 109; 44 Atl., 999.

Snell v. Bray, 56 Wis., 156; 14 N. W., 14.

Hinshaw v. State, 147 Ind., 334; 47 N. E., 157, 166.

Mayfield testified that he could recollect the names of only a few of his ex-employees who were about his place of business when the enormous amounts of the product labeled Koke are alleged to have been made by him. Within a month after Mayfield testified, The Coca-Cola Company located twenty-one of them and took their depositions—no one of them had ever heard of Koke. They were equally available to the Koke Companies and were not called. This failure to produce as witnesses persons who could shed light on the facts is suspicious. This rule is applied in trade-mark cases.

Atlantic Milling Co. v. Robinson, 20 Fed., 217.

Atwood-Morrison Co. v. Sipp Electric & Machine Co., 136 Fed., 859.

American Bell Tel. Co. v. National Tel. Mfg. Co., 109 Fed., 976, 1018.

Bettendorf v. J. R. Little Metal Wheel Co., 123 Fed., 433, 435.

Acme Flexible Clasp Co. v. Cary Mfg. Co., 101 Fed., 269.

It seems clear, therefore, even if the impossible concession be made that Mayfield is unimpeached, the testimony given by the witnesses called by the Koke Companies in support of the contention that the word Koke has been continuously used by them and their alleged predecessor, Mayfield, since 1888 abounds in such improbabilities and is so saturated with the things which prompt courts to disbelieve evidence, however positive and by whatever number of witnesses given that the defense here is inherently incredible. But when, as in this case, such evidence as is here adduced by the Koke Companies, is used as corroborative of the fantastic story of the party most interested in their success—whose testimony was disbelieved by Judge Sawtelle and Judge Foster on the same record here before this court, an individual whose demeanor on the witness stand is characterized by the Examiner of Interferences in the Patent Office by the words “he apparently attached no importance to the fact that he was testifying under oath,” this would seem to be a case for the application of Lord Stowell’s dictum in *The Odin*, 1 C. Rob., 248, 252 (quoted in *The Dolphin*, 7 Fed. Cas., 3795):

“It is a wild conceit that any court of justice is bound by mere swearing; it is the swearing credibly that is to conclude its judgment.”

(b) The Koke Companies asserted title to Koke and Dope by assignment.

There remains to discuss only the alleged acquisition of the trade-mark Koke from the Murfreesboro Bottling Works and W. L. Bitting and the Dope mark from Houpert & Worcester. It can hardly be contended that any right was obtained by reason of these assignments. It is clear that in these transactions no business or good will was taken over, that the sales were sales of a naked symbol and as such confer no right on the assignee, and

that the transactions were a part of Mayfield's fraudulent scheme to claim some sort of right in the names Koke and Dope is evident.

(1) **Murfreesboro Bottling Works.**

It appears in this case that the Murfreesboro Bottling Works, Christy and Huggins, proprietors, caused the registration of the work Koke in script in the Patent Office of the United States on August 21, 1906, as a trade-mark for beverages. The certificate is number 58,878.

Christy and Huggins, proprietors of the Murfreesboro Bottling Works, were called in rebuttal (Rec., 2005, 2027). They testified that they adopted the name Koke because it was a well known and recognized nickname for Coca-Cola; that they were trying to imitate Coca-Cola and get a product as close as they could and that the script was used for the word Koke to make the label look like Coca-Cola. They admitted the sale of the trade-mark only to Mayfield. No business of any sort was turned over and they denied categorically Mayfield's statement that he said anything about any previous use of the word Koke by him.

(2) **W. L. Bitting.**

The transactions with W. L. Bitting of Sherman, Texas, involved two registrations, one a label or copy-right registration of the word Koke applied to a chemical compound (Number 56923, Rebuttal Exhibit 80), and another of a later date of the word Koke as a trade-mark for a beverage or syrup, the word Koke appearing in block type. (Certificate Number 94689, Jan. 13, 1914, Rebuttal Exhibit 81.)

It appears in rebuttal, by the testimony of Haizlip and Penland, who had been Bitting's employes (Rec.,

1950, 1977) that W. L. Bitting was a druggist in Sherman, Texas; that he was one of the first handlers of Coca-Cola in Sherman and that Coca-Cola was known and asked for at Bitting's fountain as early as 1893 as Koke; that Bitting got into some sort of a controversy with The Coca-Cola Company, who declined to give him the exclusive sale of its product in Sherman, Texas; Bitting thereupon began experimenting with an imitation of Coca-Cola and was trying to sell it; that he used the name Koke as applied to an adulterated cocaine which he was selling. This doubtless is the "chemical compound" referred to in the label registration.

The purchases from the Murfreesboro Bottling Works and Bitting are aptly characterized by Judge Sawtelle as follows:

"I find that the purchase of the trade-mark 'Koke' from the Murfreesboro Bottling Works and from Bitting was made with the knowledge that same was being used to imitate plaintiff's product and were acquired not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola."

Judge Foster concurs in this conclusion.

The Examiner in the Patent Office from the same record here before the court, sums up these transactions as follows:

"In 1911 Mayfield learned that the Murfreesboro Bottling Works, of Murfreesboro, Tennessee, was carrying on some kind of a business under a registered trade-mark 'Koke.' (Applicant's Rec., p. 789.) Mayfield's company purchased that registration for a material consideration (Defendant's Exhibit No. 67) without entering into any contest, although Mayfield claims to have used the name 'Koke' as a distinguishing mark for his goods continuously since the year 1888. The earliest date of use alleged in the

Murfreesboro registration is May 1, 1902. (Defendant's Exhibit No. 129.) Mayfield admits that he took nothing from the Murfreesboro Bottling Works, as a result of this transaction, other than the certificate of registration. The business and formulae were not transferred. (Applicant's Rec., pp. 860 and 923.)

In 1913 Mayfield was notified that an application for registration of the word 'Koke' as a trade-mark for a non-alcoholic beverage, was being prosecuted before the U. S. Patent Office by one William L. Bitting of Texas. Instead of contesting an interference with Bitting, whose earliest alleged date of use was November 10, 1898, Mayfield's Company bought Bitting's application and had the mark registered to the Koke Company of America as assignee. (Applicant's Rec., pp. 829, 830, 923; Defendant's Exhibits No. 126 and No. 128.) That applicant took nothing from Bitting in the nature of apparatus, labels, formulae or other tangible assets, is admitted. (Applicant's Rec., pp. 921, 922.) Applicant purchased nothing but the bare application for trade-mark registration together with a label registration owned by Bitting. (Defendant's Exhibit No. 126 and No. 127.)

* * * *

That the applicant acquired nothing by the purchase of the bare trade-mark registration and application for registration, one from Murfreesboro Bottling Works and the other from Bitting, cannot be seriously questioned. It is so well settled that a trade-mark cannot be transferred, independently of the business and good will in connection with which it has been used, as to render further discussion or the citation of authorities unnecessary."

This rule is elementary and is sustained by all the cases.

Bulte v. Igleheart Bros., 137 Fed., 492, 498; *Cotton v. Gillard*, 44 L. J. Ch., 90; *Croft v. Day*, 7 Beav., 84; *Robertson v. Quiddington*, 28 Beav., 529; *Singer Manufacturing Company v. Loog*, 8 App. Cases, 15; *Gegg v. Bassett*, 3

Ont. L. Rep., 263; *Kidd v. Johnson*, 100 U. S., 620, 25 L. Ed., 769; *Brown Chemical Company v. Meyer*, 139 U. S., 540, 11 Sup. Ct., 625, 35 L. Ed., 247; *Chadwick v. Corvell*, 151 Mass., 190, 23 N. E., 1068, 6 L. R. A., 839, 21 Am. St. Rep., 442; *Congress, etc., Spring Company v. High Rock Congress Spring Company*, 45 N. Y., 291, 302, 6 Am. Rep., 82; *Independent Baking Powder Company v. Boorman*, 175 Fed., 448, 450; *Macmahon Pharmacal Co. v. Denver Chemical Mfg. Co.*, 113 Fed., 468, 474; *Messer v. The Fadettes*, 168 Mass., 140; 46 N. E., 407; *Morales v. The Fair*, 82 Ill. App., 499; *Browne on Trade-Marks*, Sec. 363; *Sebastian on Trade-Marks*, 11; *Kerly on Trade-Marks*, 272; *McVeagh v. Valencia Cigar Factory*, 32 O. G., 1124; *Price & Stewart*, 970; *Witthaus v. Braun*, 44 Md., 303; *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. Cas., 523, 532; *Morgan v. Rogers*, 19 Fed., 596; *Eiseman v. Schiffer*, 157 Fed., 473, 476.

(3) The alleged acquisition of the Dope mark from Houppert and Worcester.

Houppert and Worcester were a bottling firm in Nashville. They adopted, as a name for a beverage, the word Dope and caused it to be registered as a trade-mark for beverages in the Patent Office on June 4, 1907, Number 63033. This registration was purchased by Mayfield and Mayfield, a firm consisting of J. C. Mayfield and his son S. T. Mayfield, and afterwards assigned to the Koke Company of America. That no business was transferred from Houppert and Worcester to Mayfield and Mayfield is evident.

Al. E. Campbell (Rec., 1363), Secretary and Treasurer of the Birmingham Bottling Company, testified that the firm of Houppert and Worcester, making soda waters in Birmingham, consisted of P. L. Houppert and Sam H. Worcester. Houppert and Worcester were succeeded

by Houppert and Smyly, the National Dope Company and Birmingham Bottling Company, successively. The details are to be found in the testimony of Campbell (Rec., 1365) and E. J. Smyly (Rec., 1392 and following). P. L. Houppert died October 8, 1911. Campbell and a man named Frank Seiver were appointed administrators of his estate on October 1, 1911.

The recitals in the documentary exhibits offered by the Koke Companies in proof of this transaction are widely variant from the facts as testified to. But however that may be, it is clear the pretended assignment was a nullity.

The transaction is described by Mr. Campbell in his deposition taken on behalf of the Koke Companies. (Rec., 1370-1372.) Campbell states that the certificate of registration was all Mayfield wanted, and that was all that was sold, or was intended to be sold to him as a matter of fact. That no business was turned over it was necessary to go through with the elaborate performance of contracts and the recitals in them to satisfy lawyers.

Houppert & Worcester continued the sale of a product under the name Dope after the pretended assignment and continued business just as they had before (Rec., 1375) and their successors are still using the name (Rec., 1372, 1376).

It is a fair inference that the word Dope was adopted by Houppert and Worcester because it was known to be a Coca-Cola nickname. (Rec., 1399.)

The same rule of law applies here as in the pretended Koke transfers.

A mark fraudulent in inception and use is attempted to be bought by means of a void transfer by an unfair trader to further his fraudulent schemes. The comments of Judge Sawtelle properly characterize the transaction and the authorities cited are decisive of it.

This closes the discussion of the case as far as it concerns any affirmative right in the words Koke and Dope in the Koke companies. There remains to consider the contention that the words Koke and Dope may be used because they are descriptive terms and refer to any soft drink.

Before discussing this defense,—that the names Koke and Dope are generic terms for soft drinks generally, which may be used by anybody,—it is well perhaps to have two things in mind. First, that this defense is wholly inconsistent with the claim of exclusive right in these words asserted by the Koke Companies and demonstrates the lack of good faith in their representations to the trade that the words Koke and Dope are their trade-marks, and that to sell anything in response to requests for Koke or Dope but the Koke Companies' product is unfair, unlawful and in violation of the Federal Statutes; and, second, to consider for a moment the character of the persons who give the testimony upon which is based the contention that the names Koke and Dope are generic and descriptive.

Among the trade witnesses who were called in the attempt to prove that the words Koke and Dope mean, not Coca-Cola, but any soft drink, are included a large number of saloonkeepers and bartenders, at least two convicts, one infringing manufacturer now under injunction for piracy upon the Coca-Cola trade-mark, and three other persons enjoined by Federal Courts for fraudulent trade practices in passing off imitation products upon calls for Coca-Cola, five persons who have confessed in writing to be guilty of similar practices and thirty others against whom the same offense is proved. There is a detailed consideration of the testimony of these witnesses at the conclusion of Schedule II.

The trade witnesses called by The Coca-Cola Company testified that for many years Coca-Cola has been familiarly known to them and to their customers under the nicknames Koke and Dope, and that these names are understood to refer to and designate Coca-Cola only. These people are responsible business men of standing and experience. The trade witnesses called by the Koke Companies were not only much fewer, but were not nearly as well qualified to speak.

(2) The defense that Koke and Dope are generic terms which may be used by anybody.

In their attempt to establish this defense the Koke Companies called two classes of witnesses, fountain attendants and saloonkeepers and bartenders. The general attitude of the latter on the subject of soft drinks may be summarized by the statements of some of them.

A. A. Stanley, of Chattanooga (Rec., 1004): "I never drink anything but whiskey."

W. J. Finnin, who has a saloon in Commercial alley in New Orleans (Rec., 1564):

"I said to one of my customers," he testified concerning Coca-Cola, "I wondered how the dickens he liked so damn much of that stuff all day long."

M. J. Costello, Chattanooga, Tenn. (Rec., 1000): "I never drank any of them. I sometimes used them for a chaser."

It is not unnatural that bartenders and near-beer vendors in prohibition districts should regard anyone asking for a soft drink in their places of business as a harmless lunatic and entitled to no consideration and that they should give in response to calls for Koke and Dope anything from Coca-Cola to white pop—the first and cheapest thing they could get their hands on.

Of course, as "experts" these men are worthless. One of them was frank enough to say:

Luke Pogue (Rec., 1061):

"In the beer business it is different from the soda business. Take a fellow who drinks beer and whiskey and wants to get on the 'water wagon.' He might want Poinsetta and say he is drinking 'Dope' or soda water or anything like that is 'Dope' with him."

Why a group of men whose only connection with the soft drink trade is incidental and reluctant should be called to advise the court as experts is incomprehensible, except on the ground that reputable men who know the business are unwilling to subscribe to views which would help our adversaries' case.

The other class of witnesses produced are druggists, most of whom are guilty of acts of fraud similar to those of which the Koke Companies are accused, namely, substitution and passing off.

The testimony of the first class of witnesses—the saloonkeepers—is, of course, worthless. They do not know what they are talking about, and as a help to the court, their testimony is of no consequence whatever, but both they and the second class of witnesses have their views colored by interest.

It is a fact, as this record clearly shows, that in spite of all the efforts of The Coca-Cola Company to suppress them, there are innumerable imitations of Coca-Cola upon the market. Without exception these imitations taste as much like Coca-Cola as it is possible to make them, and are indistinguishable from Coca-Cola in appearance. They are given various names, to a greater or less extent, imitating the name Coca-Cola. They are sold to the dealers at a cheaper price than Coca-Cola and their sale produces a greater profit. These products are not desired by the public and are unknown. They are

seldom or never called for by their own names. This fact is clearly established by the testimony. For example—

C. H. Jouett, with the Live and Let Live Drug Company, St. Elmo, Tenn., a witness for the Koke Companies, testified as follows (Rec., 1059):

“I never heard customers ask for Ko Nut.”

The way Ko Nut is sold is shown by the testimony of J. E. Jones, a druggist of Hattiesburg, Miss., one of the Koke Companies’ witnesses (Rec., 1800, 1801):

“When customers came to my fountain first prior to the time I handled Konut and made a request for a drink of Koke or Dope I serve them Coca-Cola. I never handled any other drink but Coca-Cola. At that time I understood they wanted that. Konut syrup costs a dollar a gallon. Coca-Cola a dollar and a half. The difference in price is the reason I handled it.

* * * * *

When a customer comes in and asks for a Dope or Koke I thought when I give him any cola drink I was in my rights. I did not know what the customer wanted in my mind. I just gave him the cola product I had, the cheaper product. Any man is in business for his profits.”

R. W. Elliott, a witness for The Coca-Cola Company, in charge of the Van Antwerp Drug Store soda department, in Mobile, testified (Rec., 566):

“I don’t believe I ever did hear of a man ordering any other cola drinks. I have heard of other cola drinks, but I have never heard a man ask for another cola drink over the fountain.”

George L. Seibert, soda dispenser for Dave S. Bauer, druggist, in Mobile, Ala., testified (Rec., 554):

“I have never heard anybody ask for any other cola drinks than Coca-Cola.”

Dave S. Bauer, druggist, of Mobile, Alabama, testified (Rec., 543):

“I have never heard of anyone asking for ‘Wise

Ola,' 'Ala Cola,' 'My Coca,' 'Rye Ola,' 'Afri Cola' or 'Ko Nut,' except what traveling salesmen have told me."

These products are offered to dealers as substitutes for Coca-Cola and are designed only to trade on Coca-Cola's reputation and advertising.

C. G. Peters, druggist in New Orleans for 28 years says (Rec., 656):

"You ask if I know what others call for. I will tell you, I had so darn many come around there that I ran them all out; they come and sell a thing as Coca-Cola and tell you you can use it as Coca-Cola, and expect you to substitute and use it as Coca-Cola. Every one of them does that, all that have been in my store—there has been 'Gay Ola,' and 'My Ola'—I don't know how many different kinds, about a dozen—all rivals of Coca-Cola, and not a one spent a dollar of advertising, and all trying to work on the advertising the Coca-Cola people are doing."

Pierre August Capdau, a pharmacist, for thirty years in New Orleans (Rec., 668):

"Well, occasionally, I see an advertisement—'Afri Cola,' and some other cola drinks, but not in the same way. These advertisements that I usually see don't impress me as being serious advertising, but simply sporadic—break out occasionally."

It is admitted that these products are imitations of Coca-Cola and are used to deceive.

J. E. Dunn, dispenser in employ of Nashville Drug Co., Nashville, Tenn., a witness called by the Koke Companies, testified as follows (Rec., 1159):

"We handled Coca-Cola exclusively. I regard these other cola drinks as imitations used principally as substitutes. At our present store we handle nothing but Coca-Cola and in response to calls for Koke and Dope or a shot in the arm, I serve him with Coca-Cola and understand that is what he means the biggest portion of my time. They use those names as nicknames for genuine Coca-Cola.

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These other cola drinks are cheaper and they make a little more money on it. Some do not run anything else in the fountain but that. Some places running up-to-date fountains, and a man calls for Coca-Cola he does not know what he is getting, except at this place up here, and it is very seldom they call for Coca-Cola straight, because practically everybody knew what we handled. If a man put it in his place, and serves it to everybody that comes in, no matter what they call for, it would be a substitute, but if a man puts it in and has Coca-Cola with it, and if a man calls for the substitute drink give it to him, but unless he calls for the genuine stuff give it to him.

* * * *

If a person asked for a Dope and I gave him this so-called substitute, if he was a stranger to me and I did not have a personal knowledge that he wanted Coca-Cola, I would consider I was giving him what he wanted. You will find the biggest majority of dispensers that are serving too will do that.

* * * *

They give themselves the benefit of the doubt, they don't care so long as they get the drink to him and make more money out of it."

J. C. Price, one of the Koke Companies' witnesses in the restaurant business in Nashville, testified (Rec., 1208):

"By competing drinks, I mean those drinks * * * sometimes spoken of as substitutes. Coca-Cola is the genuine * * * the product made in Atlanta."

(Rec., 1208):

"Those competing drinks cost the dealer less money than Coca-Cola, and there is more profit in it. When a man comes in and asks for a Koke or a Dope and if I have any of the competing drinks I give him the competing drink, but if I have not got the competing drink I give him the genuine, but if I have both I give the competing drink, because I can make more money on it."

(Rec., 1205.) In St. Louis:

"A. I had the Coca-Cola, the genuine Coca-Cola

and another cola. When customers came in and asked for a Koke or a Dope I sold the competing drink. If they asked for Coca-Cola I give them the genuine Coca-Cola. We served the competing drink because we felt like they did not want the genuine, if they did they would call for it by the full name."

* * * * *

(Rec., 1206) :

"Customers asking for Coca-Cola were served the genuine Coca-Cola. I do not know whether or not any of our customers in calling for Koke and Dope knew they were getting a different brand of drink from Coca-Cola, but they all seemed satisfied. Very seldom I ever had a man turn it down and say it was not the genuine—I mean a man come in and call for Dope and it was very seldom I had a man go away dissatisfied."

The foregoing is typical.

These substitutes are handled by the dealers because they can be sold to the consumer as Coca-Cola, a greater profit realized, and the consumer cannot tell the difference. Those dealers, who for fear of getting caught, hesitate to sell these substitutes when Coca-Cola is called for by the name Coca-Cola, do so when the consumer uses a Coca-Cola nickname in making his wants known, and the substituting dealer then justifies himself that he is not passing off because the customer has not asked for Coca-Cola by the name Coca-Cola, but has used some slang phrase, abbreviation or nickname which he understands to mean Coca-Cola, and which the dealer also so understands. The common nicknames used are Koke and Dope, which to the public mean Coca-Cola, and which the dealer knows, but the cheaper and more profitable and indistinguishable substitute is passed off because the substituting dealer is able to excuse himself by saying that the customer has not asked for Coca-Cola, and if he wanted Coca-Cola he would say Coca-Cola. This is very clearly shown from the testimony and it may safely be

said that all of the witnesses produced by the Koke Companies in an attempt to prove that the words Koke and Dope are common names for a class of drinks, can be grouped under this head. They are people who are attempting to justify their own fraud.

The testimony of Embrey (Rec., 1018) taken at Chattanooga, and quoted at length in Schedule VI, is entirely characteristic. First he handled only Coca-Cola. He recognized, as did his customers, that the name was abbreviated into Koke and that it was nicknamed Dope. This situation had existed for years. Then an imitation was offered at a lower price. This at first perhaps was not passed off on people who used the name Coca-Cola when making known their wants. The genuine was usually kept on hand to supply such. But when people used the familiar nicknames Koke and Dope the imitation was sold without comment and the customer did not know the difference. The failure of the purchaser to use the name Coca-Cola was the excuse of the dealer to sell the cheap imitation. The next step was inevitable, the imitation having demonstrated its ability to escape detection when sold to people who asked for Koke or Dope, and meant Coca-Cola, was soon sold to people who used the name Coca-Cola. As E. A. Sharp (Rec., 1260), one of the Koke Companies' witnesses admitted, "I do not know that I can say I never had served any other drink beside Coca-Cola when Coca-Cola was called for, because you are liable to get them mixed up in a soda fountain. They are so much alike I think anybody is liable to get them mixed up."

The inside of the whole contention that Koke and Dope mean any drink similar to Coca-Cola is exposed by the Koke Companies' witness F. H. Willis, soda dispenser, in the employ of Ha Ha Store, No. 3 Arcade, Nashville, Tenn., as follows (Rec., 1192):

"Fletchers Cola was given when people asked for

Dope or Koke. We did that because we made more money on it.”

* * * *

This witness handles Candy Cola made by Matthews in Nashville.

“Some of our customers know we are handling Candy Cola. I do not know whether the general public knows of Candy Cola or not. I never saw any advertising of Candy Cola. I do not know whether people who come into our store and ask for Koke or Dope expect to get Candy Cola or not, but they expect to get some kind of a cola that we serve there. I do not know what they expect to get. I give them Candy Cola.

I never sell Coca-Cola when Koke or Dope is asked for. I have instructions to sell Candy Cola when Koke or Dope is called for.

* * * *

We do not sell Candy Cola when Coca-Cola is asked for. * * * I might have served Candy Cola in response to calls for Coca-Cola.”

This witness was asked concerning the pumps of his soda fountain (Rec., 1194):

“No. 5 is labeled Coca-Cola, and we keep Candy Cola in the Coca-Cola jar.”

J. M. Smith, another of the Koke Companies' witnesses who handles Matthews product, said (Rec., 1185):

“There is a difference in profit in favor of Matthews' syrup, it costs less than Coca-Cola. I have Coca-Cola advertisements and signs ‘Drink Coca-Cola,’ * * * I have not any signs of Matthews' drink. * * * I have not been out of this Matthews mixture for sixty days. Mistakes are liable to happen.”

The testimony in support of the contention that Koke and Dope are generic terms and apply to all drinks like Coca-Cola proves too much. The witnesses testify that these names apply to all drinks of this kind, *except Coca-Cola*—that they do not apply to Coca-Cola because Coca-Cola costs too much.

G. G. DeSouchet, one of the Koke Companies' witnesses—in the saloon business in Birmingham, testified (Rec., 1350):

“Customers frequently came in and asked for Dope. I gave them something besides Coca-Cola, some of the other Cola drinks. I done that for the reason of the price, that is all. Not on account of the goods, that is Coca-Cola costs 70 cents up there and the other costs 50.”

If the names Dope and Koke apply to a class of drinks, undeniably Coca-Cola is in that class—the words should apply to it as well as the others—and here lies the answer—the public pays five cents a glass for all of them—and cannot tell the difference. The Coca-Cola nicknames are definite enough with the public—they mean Coca-Cola—it is only with the swindling dealer that there is any doubt about it—a doubt to excuse a fraud and for revenue only.

The proof adduced by the Koke Companies that other manufacturers of soft drinks have imitated Coca-Cola in color, taste and appearance, bottles, barrels and dress, does not sustain the contention that these elements are common to the trade. On the contrary, it goes to show that others have been guilty of acts of fraud similar to those charged against the unfair traders here before the court and is an aggravation rather than a defense.

In *Singer Company v. June*, 163 U. S., 169, the complainant was in the habit of numbering its sewing machines serially, and, since it was a large manufacturer and had been in business many years, these numbers ran into the millions. Defendant, a small manufacturer recently established, began number in the millions. It was contended that this was a trade custom.

Mr. Justice White said (202):

“But there are other circumstances in the record which throw light upon the facts which we have just

stated, and lend to them an increased significance. On the plate of the Singer machines there was plainly marked a number, which the proof shows had run with relatively accurate consecutiveness from the beginning. These numbers, as a result of the vast development of the business of the Singer Company and the enormous number of New Family machines sold by them, ran into the millions. The defendant, who was in the commencement of his business, at once began also to number his machines in the millions, thereby conveying the obvious impression that they were the result of a manufacture long established, and as they were marked 'Singer' suggesting by an irresistible implication, that they were machines made by the Singer Company. There is an attempt in the evidence to explain this fact by the statement that it was the habit of sewing machine makers to add three figures to the actual number of machines by them made, but the proof does not sustain the explanation, and if it did, it amounts to but the contention that the commission of a fraud should be condoned because others were guilty of similar attempts to deceive."

See also:

Ultramarine Fabriken v. Amberg, 109 Fed., 151.

Gillott v. Esterbrook, 47 Barb., 455; R. Cox, 340;
48 N. Y., 374.

Cook v. Ross, 73 Fed., 203.

Celluloid Co. v. Cellonite Co., 32 Fed., 94, 101.

Taylor v. Carpenter, 3 Story, 458; R. Cox, 14, 19.

Sheppard v. Stuart, 13 Phila., 117; P. & S., 193,
202.

Liebig's Extract Co. v. Chemists Co-Op. Soc., 13
R. P. C., 635.

The court below entered a proper decree.

The court below has found that the Koke Companies have been guilty of unfair trade in the superlative degree. That, as a matter of fact from the evidence they were organized for the purpose of manufacturing and

selling a syrup in imitation of Coca-Cola, aided the persons to whom the product was sold in its substitution for Coca-Cola; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by The Coca-Cola Company; that the word "Koke" is a nickname for Coca-Cola, and was adopted with the deliberate purpose of representing the Koke Companies' goods to be the manufacture of the Coca-Cola Company; that the Koke Companies imitated the Coca-Cola label and copied and imitated the barrels in which Coca-Cola is shipped; that the word "Dope" is a nickname for Coca-Cola and was adopted and used by the Koke Companies to take advantage of this fact; that the Koke Companies' salesmen were instructed to and did sell the Koke Companies' product as and for Coca-Cola; and in finding that Mayfield did not adopt the word Koke until 1909, the court evidently disbelieved his statement of use prior to that time, and by the strongest possible inference has convicted Mayfield of wilful perjury because there is no possibility that he could honestly be mistaken in his assertions of such prior use.

The authorities all agree that a plaintiff, having established unfair trade, is entitled to practical relief; that the restraint should be commensurate with the wrong, and that the court should strive to see, not how much of the trade gained by fraudulent methods it can preserve to a defendant, but how effectually it can stop the piratical practices.

Oneida Community, Ltd., v. Oneida Game Trap Co., Inc., 154 N. Y. S., 391, Woodward, J., said:

"The plaintiff is entitled to a practical injunction. * * * It is not the province of a court of equity to aid wrongdoers. It fulfills its mission when it has restrained the commission of a wrong, leaving the wrongdoer to figure out for himself how

far he can disregard the mandate of the court and the requirements of a clean conscience.”

Guth Chocolate Co. v. Guth, 215 Fed., 750, Rose, J. (766):

“Where he has greatly offended, he may be strictly restrained.”

Williams v. Johnson, 2 Bosw., 1; *R. Cox*, 214, Woodruff, J.:

“It is so palpable as to admit of no reasonable doubt that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired. He is in this respect entitled to no favor. The court, in considering the propriety of enjoining him pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions, so that he may evade the letter and violate the scope and spirit of the adjudged cases.”

In *Valentine v. Valentine*, 17 R. P. C., 673, 686, Lord Justice Rigby said:

“That being the main ground on which they have proceeded in this case, I do not see how they can really seriously object, having been guilty of unfair trading—and to my mind utterly unfair trading—they cannot very well say, ‘oh, here and there you have been rather hard upon us.’ I want to see how that unfair trading can be put an end to—not how much of it we can preserve.”

In *Anheuser-Busch v. Piza*, 24 Fed., 149, Judge Wallace said:

“It is not unreasonable, in view of the defendant’s purpose to deceive the public by adopting this label, to resolve any doubt which may remain in favor of the complainant.”

In *Franck v. Frank*, 95 Fed., 818, Judge Seaman said (820):

“The defendants must be allowed no advantage out of the trade thus obtained wrongfully but must establish the reputation of their goods upon merit,

and without benefit of the imitation. Decree for the complainants may be prepared accordingly.”

In *Hires v. Consumers Co.*, 100 Fed., 809, Judge Jenkins said (813):

“This is especially so here, where the infringement was deliberate and designed. In such case the court ought not to say how near the infringer may lawfully approximate the label of the complainant, but should cast the burden upon the guilty party of deciding for himself how near he may with safety drive to the edge of the precipice and whether it be not better for him to keep as far from it as possible.”

The language of the Circuit Court of Appeals of the Sixth Circuit, where the imitation of the color of Coca-Cola was enjoined, is pertinent here.

In *Coca-Cola v. Gay-Ola Co.*, 200 Fed., 720, Judge Denison said:

“We rest our conclusion here upon the fact that the color was adopted in part as a means of aiding the contemplated fraud, and that, if its adoption was also in part innocent, there is here a confusion caused by defendant; that the burden is therefore upon defendant to see to it that ultimate fraud does not result from this confusion; and that, so far as defendant cannot safeguard this result, it may not use the color. * * * The defendant should be enjoined from selling Gay-Ola of a color the same as or substantially similar to Coca-Cola, unless and in so far as upon settlement of the decree below means may be provided by which the ultimate consumer will be fairly advised that he is not getting complainant's Coca-Cola, but is getting something else.”

See also 211 Fed., 942, on settlement of the decree, and *Hiram Walker v. Grubman*, 222 Fed., 478.

The nature of the relief granted in unfair trade cases is flexible and depends upon the facts upon which it is based. As courts have always refrained from defining unfair trade but have regarded as actionable any con-

duct which has a tendency to promote the sale of the goods of one trader as and for those of another, so in measuring the relief, it is made to conform to the practical trade situation disclosed, and depends upon the facts of each case, the nature of the trade, the manner of the injury and the flagrancy of the offense. There is no set form of injunction, but the courts measure the relief to suit the circumstances. The following authorities indicate the adaptability of courts of equity in such matters:

The Lord Chancellor said, in *Reddaway v. Banham*, 13 R. P. C., 218, 225:

“What in each case, or in each trade, will produce the effect intended to be prohibited, is a matter which must depend upon the circumstances of each case, and the peculiarities of each trade. It would be very rash *a priori* to say how far a thing might or might not be described without being familiar with the technology of the trade.”

As was said by Mr. Justice Stirling, in *Powell v. Birmingham Vinegar Brewery Co.*, 12 R. P. C., 496, 515:

“Now, although it has several times been laid down that it is the duty of the person who thus introduces articles of his manufacture into the market under the same name as that employed by another manufacturer, to distinguish the goods so newly introduced from those previously in the market, no court has ever said how the distinction is to be made, and, in my judgment, this is not a matter which can be reduced to any simple rule, but must depend on the circumstances of each particular case. It may very well be that what is sufficient in the case of a wine producer, may not be enough in the case of a brewer, and that that which is perfectly adequate in the case of a brewer, may prove to be quite inadequate in the case of a maker of pickles and sauces. The one point to be considered in each case appears to me to be whether the natural and probable result of the defendants’ acts will be to mislead purchasers, and so deprive the plaintiff of business intended for him.”

On appeal the matter was discussed at considerable length. Lord Justice Lindley said, 13 R. P. C., 253; (1894) 3 Ch., 449; (1894) 3 Ch., 462; (1896) 2 Ch., 64; (1897) A. C., 710:

“If it be impossible, profitably, to use the old name, and at the same time so to distinguish the two classes of goods as to prevent the rival goods from being mistaken for others, what is to be done? Is the name to be protected and rivalry prevented, or is the rival to be at liberty to use the name and destroy the trade of the old trader? Both principle and authority clearly appear to be in favor of the old trader, if he can prove that the name denotes his goods, and that his rival’s are, in fact, mistaken for his.

I do not shrink from the conclusion that the defendants may find it practically impossible profitably to compete with the plaintiffs in their trade. I do not see the injustice of such a conclusion, nor do I see that the public will greatly, if at all, suffer by it.”

Lord Justice Smith said, 13 R. P. C., 263:

“It may be that the result of such a state of things is that it gives to the plaintiff a practical monopoly in the words which otherwise he would not have, and it appears to me, so far as the evidence as to this in the present case goes, that this is so. Whether it is possible to mask the words ‘Yorkshire Relish’ so that they will become innocuous, such as by selling ‘Yorkshire Relish’ in jars, or tins, or barrels. I do not know, but it would seem that, if this be possible, and it be done so that the words do not mislead, then the object which I have no doubt the defendants have in using the words will be thereby frustrated.”

An illustration of the application of this rule is found in *Thompson v. Montgomery* (1891) A. C., 217, 8 R. P. C., 361, 365, 368. In this case, plaintiff’s ales, from the fact that they were brewed in the Town of Stone, became known as “Stone Ales.” Defendant went to Stone and established a brewery and called the ale he brewed there “Stone Ale.” He was held to be an unfair trader, but on the settlement of the decree contended that he had a

right to establish his brewery at the Town of Stone and should be permitted to use the name of that town.

Lord Herschell said (8 R. P. C., 365):

“It appears to me idle to argue in opposition to the injunction that it is against the public interest to permit a monopoly of the use of the name of a town for trade purposes, when the only effect of allowing its use by the person, and for the purpose sought to be restrained, would be to deceive the public.”

This case has been repeatedly cited with approval by the Supreme Court. See:

Lawrence Manfg. Co. v. Tenn. Manfg. Co., 138 U. S., 550.

Coates v. Merrick Thread Co., 149 U. S., 562, 566.

See also:

Sheffield-King Milling Co. v. Sheffield Mill & Elevator Co., 105 Minn., 315; 117 N. W., 447.

Gustavino v. Comerma, 184 Fed., 549, 550.

Portuondo v. Portuondo, 222 Pa., 116; 70 At., 968, 973, 975, 976.

Van Stan v. Van Stan, 209 Pa., 564; 58 At., 1064, 1066.

Cohen v. Nagle, 190 Mass., 4; 76 N. E., 276, 278, 282.

The injunction directed by the court below is no broader than is necessary to protect The Coca-Cola Company from the acts of unfair trading of which the Koke Companies are guilty. It enjoins in terms the efficient means of fraud and deception which the Koke Companies have used, as the result of which their goods have been sold as and for Coca-Cola and the elements which promote and contribute to this fraud. For the protection both of The Coca-Cola Company and the public, such restraint is necessary. If the findings of fact on which the decree is

based are concurred in, the injunction in the terms granted follows as a necessary conclusion.

There can be no criticism of the court's decree, unless it be that it effectually stops fraud. It in no way hampers the Koke Companies in the sale of an honest product, decently and on its merits.

Conclusion.

We believe that under the evidence in this case and under the authorities cited, the use of the Coca-Cola nicknames Koke and Dope by the Koke Companies produces confusion of goods, deception of the public and damage to The Coca-Cola Company, and that restraint against their use was proper; that the imitation of Coca-Cola in taste and appearance and the imitation of labels and barrels are important elements in the Koke Companies' fraudulent scheme and aid the deception and damage initiated by their use of the Coca-Cola nicknames and are efficient helps in their course of unfair trading; that the defense interposed here of prior use of the word Koke based as it is on Mayfield's testimony, is fabricated; that the claims of Mayfield to know the Coca-Cola formula or to have any rights in it or in the Coca-Cola business and ever to have used the name Koke before 1909 are pure inventions; that the defense interposed in so far as it relates to the alleged common trade meaning of the words Koke and Dope is wholly disingenuous; that the pretended purchase of the registrations of Koke and Dope from Bitting and Murfreesboro Bottling Works was an attempt to give a legitimate appearance to the Koke Companies' fraud and to clothe it with an apparent legal sanction, and thus to pirate under the forms of law; that the decision of the court below, concurred in by Judge Foster and the Patent Office, was

correct, and that no other conclusions than those arrived at by Judge Sawtelle are possible under the evidence before him and now before this court, and that his decree should be affirmed.

Respectfully submitted,

HAROLD HIRSCH,

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EDWARD S. ROGERS,

*Of Counsel for The Coca-Cola
Company, Appellee.*

WILLIAM K. WHITE,

Solicitor for Appellee.

APPENDIX I.

235 FED., 408.

IN THE DISTRICT COURT OF THE UNITED STATES
For the District of Arizona.

The Coca-Cola Company,
Plaintiff,

vs.

The Koke Company of America,
The Southern Koke Company, Ltd.,
The Koke Company of Texas,
The Koke Company of Arkansas,
The Koke Company of Oklahoma,

Defendants.

In Equity.
(Phoenix)

Harold Hirsch, of Atlanta, Georgia; Edward S. Rogers, of Chicago, Illinois, and Joseph E. Morrison, of Phoenix, Arizona, Solicitors for Complainant; Frank F. Reed, Candler, Thomson & Hirsch of Counsel.

Richard E. Sloan, of Phoenix, Arizona; James W. Westervelt, of Phoenix, Arizona, and Augustine B. Littleton, of Chattanooga, Tennessee; Littleton, Littleton & Littleton, Chattanooga, Tennessee, for Defendants.

SAWTELLE, District Judge:

The bill in this case seeks relief by injunction, both preliminary and perpetual, against the defendants because of their joint and several infringement of the plaintiff's trademark—"Coca-Cola"—and for unfair competition on their part. It also asks an accounting of the profits received by defendants, and the assessment of damages sustained by plaintiff.

The material allegations of the bill, so far as they are necessary to be set forth for the determination of the issues made, are as follows:

The first section of the bill recites the initial manufacture of

the syrup known as "Coca-Cola" by J. S. Pemberton in the year 1886, and traces the title through its various transfers into the plaintiff company on February 22, 1892.

It is alleged that the process and formula for the manufacture of the beverage and syrup styled "Coca-Cola" was new and original and was invented and discovered by plaintiff and its predecessors as a trade and business formula, process and secret, and is now a secret formula and process and not known to the public or others than the plaintiff and its officers and employees and predecessors of plaintiff.

The second section of the bill charges the continued manufacture of syrup made under the Pemberton formula; alleges that the trade-mark "Coca-Cola" was, at the time of its adoption by the predecessors of plaintiff, characteristic and distinctive and had never before been used by anyone, and has continuously been used for the purpose of distinguishing the product of plaintiff and its predecessors from the similar product of others, and that said trade-mark does now identify and distinguish plaintiff's product. It is further charged that plaintiff's product has been given by the purchasers and consumers thereof certain nicknames, to wit:

"Koke" and "Dope," and that each of these words are now and for many years past and prior to the application of either of them to any other beverage recognized and commonly and familiarly used as nicknames for Coca-Cola, and that a request for either is understood, both by the seller and the purchaser, to be a specific and definite request for Coca-Cola and has been so understood and regarded, and acted on both by the seller and purchaser, for many years prior to the manufacture or sale of any other preparation under either of said names; and that at the present time both dispensers and consumers use these words as descriptive of the product of plaintiff, and for no other beverage.

The third section of the bill alleges the application to the patent office for the registration of the words "Coca-Cola"

as a trade-mark on May 14, 1892, and the allowance of said application on January 31, 1893, and the issuance of a certificate of registration on that day, which is alleged to be in full force and wholly unrevoked and uncanceled.

It is also alleged that on April 23, 1905, under and by virtue of the Act of Congress of February 20, 1905, the plaintiff duly applied to the Patent Office of the United States for the registration of the said trade-mark "Coca-Cola," and complied in all respects with said Act and the Regulations of the Commissioner of Patents, and thereupon the registration of said trade-mark "Coca-Cola" was duly allowed for tonic beverages and syrups for the manufacture of such beverages and a certificate of registration, No. 47189, was duly granted to the plaintiff on October 31, 1905, and is still in full force and effect, and that plaintiff is entitled to the sale and exclusive right, both generally and in interstate commerce, to use and employ said trade-mark on its goods.

The fourth section of the bill alleges the sale of both the syrup and of an areated beverage, permitted to be manufactured from the syrup by certain licenses of plaintiff, under the trade name, in distinctive receptacles, bottles and barrels and labels, all of which were adopted by plaintiff for the purpose of distinguishing the product of plaintiff from that of other manufacturers in the same lines.

The fifth paragraph sets up that the plaintiff has expended much time, labor and money in advertising its product. It is alleged that the Koke Company of America was organized under the laws of the State of Arizona about September 15, 1911, and thereafter proceeded in the city of St. Louis to manufacture an unnecessary and deliberate imitation of plaintiff's Coca-Cola syrup, but different therefrom and greatly inferior thereto, and placed the same in barrels and packages similar to those of the plaintiff. That said extract is designated by the defendants sometimes as "Koke", and sometimes as "Dope"; that the Koke Company of America

ships said imitative extract from the city of St. Louis, usually under the name of "Koke", to the other defendants, and that said extract is used by said defendants as a basis for making a syrup for sale to soda fountains and in bottles which resemble the articles produced by plaintiff, and that the defendants, as a matter of fact, do sell, substitute, and palm off the said syrup and extract as and for the Coca-Cola products of plaintiff. It is alleged that the said imitation product is, with the consent of defendants, sold to the public in substitution for genuine Coca-Cola. It is further charged that the defendants adopted the words "Koke" and "Dope" as a name for their product many years after the words were commonly used to describe the plaintiff's product, and that said adoption was a means to enable them to substitute their product for that of the plaintiff and to reap the benefit of its advertising and labor in dispensing and selling said product. It is also alleged that the defendants stated, both to bottlers and dispensers, that the syrup they made was produced under the same formula as Coca-Cola, and instructed both dispensers and bottlers to substitute their product when the purchaser desired and intended to obtain Coca-Cola.

It is further alleged that the registration in the patent office of the words "Koke" and "Dope" claimed by defendants was in fraud of the rights of plaintiff, and that the defendants threaten to sue dealers and dispensers who deliver Coca-Cola when "Koke" and "Dope" are called for and when both the dispenser and purchaser design to sell and receive Coca-Cola.

The answer denies all the material allegations of the bill, and after setting up the manner of acquiring title to the trade names "Koke" and "Dope", denies that, at the time they were adopted by their predecessors, they were generally used as a synonym or nickname of plaintiff's product.

The answer then alleges that the plaintiff has been and is now engaged in establishing a monopoly, and that the busi-

ness of defendants and their patrons is being subjected to a system of espionage by plaintiff and its officers and agents, and agents are using the information thus acquired to impede and harass the customers of defendants, representing that the business of defendants is fraudulent and dishonest and its product inferior imitations of Coca-Cola, and threatening prosecutions if defendants' products are dealt in by its customers.

The answer then alleges that by reason of these representations and threats many of its customers have ceased to deal in its products to its damage. It is also contended in the answer that the name "Coca-Cola" was deceptive as a trademark and for that reason was fraudulent, and was but a descriptive name for a product which the plaintiff does not now produce.

Numerous authorities have been cited by both sides, with variant facts, but as each case must be determined on all facts that surround it the facts in any prior case cannot be a guide to the decision of the subsequent. This view is cogently pointed out on page three of lectures of John Cutler, of King's College, entitled "Passing Off".

The fundamental principle of the law applicable to this class of cases is well established. It may be thus stated: "No man has a right to pass off his goods as though they were the goods of another."

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another."

Canal Company v. Clark, 13 Wall., 311.

The difficulties which arise are in the application of this principle to the facts of the particular case, and the question which the court has to decide is always a question of fact. The decision of the court depends upon all the circumstances affecting the plaintiff and his trade and the circumstances affecting the defendant and his trade, and both alike must be

considered in arriving at a conclusion. I quote from a few of the leading cases both English and American.

In the case of *Burgess v. Burgess*, 3 Deg. M. & G., 896, Lord Chief Justice Turner, said:

“No man can have any right to represent his goods as the goods of another person, but in application of this kind it must be made out that the defendant is selling his own goods as the goods of another.”

In the case of *Reddaway v. Banham*, A. C., 199; 13 R. P. C., 224, the Lord Chancellor said:

“My lords, I believe that this case turns upon a question of fact. The question of law is so constantly mixed up with the various questions of fact which arise on an inquiry of the character in which your lordships have been engaged, that it is sometimes difficult when examining former decisions to disentangle what is decided as fact, and what is laid down as a principle of law. For myself, I believe the principle of law may be very plainly stated, and that is that nobody has any right to represent his goods as the goods of somebody else.

How far the use of particular words, signs or pictures does or does not come up to the proposition which I have enunciated in each particular case, must always be a question of evidence, and the more simple the phraseology, the more like it is to a mere description of the article sold, the greater becomes the difficulty of proof, but if the proof establishes the fact the legal consequence appears to follow.”

In a later case in the House of Lords, referring to *Burgess v. Burgess*, the Lord Chancellor made this statement:

“The proposition of law is one which, I think, has been accepted by the highest judicial authority, and acted upon for a great number of years. It is that of Lord Justice Turner, who says, in terms: ‘No man can have any right to represent his goods as the goods of another person. In the application of this kind, it must be made out that the defendant is selling his own goods as the goods of another.’ That is the only question of law which, as it appears to me, can arise in these cases. All the rest are questions of fact. The most obvious way in which a man would be infringing the rule laid down by Lord Jus-

tice Turner is if he were to say in terms, 'These are the goods manufactured by' a rival tradesman; and it seems to be assumed that unless he says something equivalent to that no action will lie. It appears to me that that is an entire delusion. By the course of trade, by the existence and technology of trade, and by the mode in which things are sold, a man may utter the same proposition, but in different words and without using the name of the rival tradesman at all. A familiar example, of course, is when, without using any name, by the identity of the form of the bottle or the form of the label, or the nature of the thing sold in the package, he is making the statement not in express words, but in one of those different forms in which the statement can be made by something that he knows will be so understood by the public. In each case it comes to be a question of whether or not there is the statement made; and if the statement is made, there can be no doubt of the legal conclusion that he must be restrained from representing that the goods that he makes are the goods of the rival tradesman. Then you get back to the proposition which I have heard from Lord Justice Turner."

Powell v. Birmingham Vinegar Co., A. C., 710; 14 R. P. C., 727.

"In all cases where rights to the exclusive right of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities."

Canal Co. v. Clark, 13 Wall., 311, 322.

"Equity gives relief in such a case, upon the grounds that one man is not allowed to offer his goods for sale, representing them to be the manufacture of another trader in the same commodity. Suppose the latter has obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price the public are willing to give for the article, rather than for the goods of the other manufacturer, whose

reputation is not so high as manufacturer. Where, therefore, a party has been in the habit of stamping his goods with a particular mark or brand, so that the purchasers of his goods having that mark or brand know them to be of his manufacture, no other manufacturer has a right to adopt the same stamp; because, by doing so, he would be substantially representing the goods to be the manufacture of the person who first adopted the stamp, and so would or might be depriving him of the profit he might make by the sale of the goods which the purchaser intended to buy. *Seiro v. Provezende*, Law Rep., 1 Ch., 195."

McLean v. Fleming, 96 U. S., 245, 251.

"The first appropriator of a name or device pointing to his ownership or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trademark must therefore be distinctive in its original signification, pointing to the origin of the articles, or it must have become such by association."

Lawrence Mfg. Co. v. Tenn Mfg. Co., 138 U. S., 537, 546.

"Every one has the right to use his own name, but he may not lawfully apply it to the purpose of filching his property from another of the same name. The use of a geographical or descriptive term confers no better right to perpetrate a fraud than the use of any other expression. The principle of law is general, and without exception. It is that no one may so exercise his own rights as to inflict unnecessary injury upon his neighbor. It is that no one may lawfully palm off the goods of one manufacturer or dealer as those of another to the latter's injury. It prohibits the perpetration of such

a fraud by the use of description or geographical terms which are not susceptible of monopolization as trade-marks as effectually as it prohibits its commission by the use of any other expressions."

Shaver v. Heller & Merz Co., 108 Fed., 821, 827.

"No person other than the owner of a trade-mark has a right, without the consent of such owner, to use the same on like articles, because by so doing he would in substance falsely represent to the public that his goods were of the manufacture or selection of the owner of the trade-mark, and thereby would or might deprive the latter of the profit he otherwise might make by the sale of the goods which the purchaser intended to buy. Where a trade-mark is infringed the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and it is on this ground that a court of equity protects trade-marks. It is not necessary that a trade-mark should on its face show the origin, manufacture or ownership of the articles to which it is applied. It is sufficient that by association with such articles in trade, it has acquired with the public an understood reference to such origin, etc. This doctrine has repeatedly been declared by the Supreme Court, *Canal Co. v. Clark*, 13 Wall, 311, 323; *Manufacturing Co. v. Trainer*, 101 U. S., 51, 54; *Medicine Co. v. Wood*, 108 U. S., 218, 223; 2 Sup. Ct., 436; *Menendez v. Holt*, 128 U. S., 514, 9 Sup. Ct., 143; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S., 598, 603, 9 Sup. St., 166; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S., 537, 546; 11 Sup. Ct., 396; *Mill Co. v. Alcorn*, 150 U. S., 460, 462; 14 Sup. Ct., 151."

Dennison v. Thomas, 94 Fed., 651, 656.

I think it has been established by the evidence in this case that the plaintiff is the owner of and alone entitled to use the trade-mark "Coca-Cola" and that its goods alone can lawfully be sold under that name.

It is insisted by the defendants that the words "Coca-Cola" are a mere description of a product, and that it does not describe the product of plaintiff, and consequently does not constitute a valid trade-mark. The contention was consid-

ered in the case of *Coca-Cola Company v. Nashville Syrup Co.*, 215 Fed., 527, and was there decided adversely to such contention. I think that decision is decisive of the question.

The question of the validity of the trade-mark "Coca-Cola" and the right of plaintiff to its exclusive use since its registration under the Act of Congress of February 20, 1905, would seem to be placed beyond the pale of contention by the case of *Coca-Cola Company v. Deacon Brown Bottling Company*, 200 Fed., 105.

I find as a matter of fact from the evidence that the defendant, Koke Company of America, was organized for the purpose of manufacturing and selling a syrup in imitation of that produced by the plaintiff, and that it aided the persons, to whom it sold its product, in the substitution of its product for that of plaintiff; that the name selected was chosen for the purpose of reaping the benefit of the advertising done by the plaintiff, and that the defendant, Koke Company of America and its predecessors, did not adopt or make use of the name "Koke" until the year 1909, and the use of said name by said defendants and its predecessors was not sufficient to create any right to its use as against the plaintiff.

Parker v. Stebler, 177 Fed., 210, 9th Circuit.

The Barbed Wire Patent, 143 U. S., 275.

Deering v. Winona Harvester Works, 155 U. S., 286.

I am convinced that when the witness Mayfield adopted the name "Koke," he did so with the deliberate purpose of representing his goods to be the product and manufacture of the Coca-Cola Company. I further find that the purchase of the trade-mark "Koke" from the Murphreesboro Bottling Works and from Bitting was made with a knowledge that same was being used to imitate plaintiff's product and were acquired, not because they distinguished the product sold under such name, but because it would permit defendants to better dispose of their product as and for Coca-Cola, especially in view of the facts that the label of plaintiff was copied and imitated

and the barrels in which its products were shipped were colored as nearly like those of plaintiff as possible.

It may be that these resemblances standing alone would not in themselves justify any relief against a person using them in good faith, but when considered in the light of all the evidence in this case, I cannot reconcile them with fairness. The opinion of the Circuit Court of Appeals of the Sixth Circuit in *Coca-Cola Company v. Gay Ola Company*, in 200 Fed., on page 723, contains a forcible comment on the state of facts here shown to exist.

“It is first to be observed that defendant is at the best no a narrow ground of legality. The name which it has adopted does not negative an intent to confuse. The product is identical, both in appearance and taste; and the form of script used in printing the trade-mark names is the same. Even if the use of each of these items of similarity was lawful, when accompanied by good faith and no intent to deceive, they put the product near that dividing line where good or bad faith is the criterion, and their presence puts upon the user a burden of care to see that deception does not naturally result. Conversely when we find, as a fact, from the other conduct of the defendant, that the underlying intent is to perpetrate a fraud upon the consumer, this intent must color the accompanying facts, and some which otherwise might be innocent become guilty. So here, the red color used by the complainant on its barrels and kegs is not a color which it discovered, or to which it had any abstract monopoly, but this color has long been used by complainant in a way that was exclusive in this trade. No other manufacturer of analogous or competing drinks uses that color of package, and its adoption by defendant is one of the constituent parts of defendant’s scheme of fraud. So, too, with defendants’ failure to mark its packages with anything to indicate the place of manufacture. Ordinarily a man may mark his goods, or not, as he pleases; but when he has his marks and labels, which he uses on occasions, and can have no motive for sending out unmarked packages except to aid in a fraudulent substitution, the act, otherwise permissible, becomes forbidden.”

The witness Wright of the Southern Koke Company justified the use of the name "Koke", for he says that the name "Koke" was adopted to take advantage of the demand for soft drinks in that name, and I conclude from the evidence in this case that the word "Dope" was adopted for the same purpose. I also find that the defendants' salesmen were instructed to sell and did sell both products as and for Coca-Cola. I find that both words are an abbreviation of the words "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product, Coca-Cola.

A decree is ordered for complainant. Counsel will prepare and tender a decree in accordance with this opinion.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
ARIZONA.

March Term, A. D. 1916.

The Coca-Cola Company,	} <i>Plaintiff,</i>
<i>vs.</i>	
The Koke Company of America,	
The Southern Koke Company, Ltd.,	
The Koke Company of Texas,	
The Koke Company of Oklahoma, and The Koke Company of Arkansas,	
<i>Defendants.</i>	}

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, IT WAS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word "Coca-Cola" is a valid trade-mark.

(3) That plaintiff is the owner of and alone entitled to use the trade-mark "Coca-Cola" and that its goods alone can lawfully be sold under the name.

(4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola."

(5) That the defendant, the Koke Company of America, and its predecessor, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that they had and have no right to its use.

(6) That defendants and their predecessors have no interest in or claim to the trade-mark "Coca-Cola," the "Coca-Cola" business or formula, and the defendants and their predecessors' claim of interest in the "Coca-Cola" business,

the trade-mark "Coca-Cola" and knowledge of the "Coca-Cola" formula are without foundation.

(7) That the words "Koke" and "Dope" were adopted and used by the defendants and their predecessors with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' products under the names "Koke" and "Dope" as and for "Coca-Cola".

(9) That the defendants, and each of them, have infringed the plaintiff's trade-mark and have been guilty of unfair competition with the plaintiff.

(10) That defendants, the Koke Company of America, the Southern Koke Company, Ltd., the Koke Company of Texas, the Koke Company of Oklahoma, and the Koke Company of Arkansas, and each of them, their officers, servants, agents, employes, attorneys, licensees, transferees and assigns, and each and all thereof, and all acting by or under their authority be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola", or any like word, or the word "Koke" or any like word, or the word "Dope" or any like word; from claiming or asserting any right in the name "Koke" or in the name "Dope", or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product, not the plaintiff's, barrels or receptacles, colored in imitation of the plaintiff's said barrels or

receptacles; from stating or representing that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula, from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of the defendants and not of the plaintiff and further, from doing any act or thing, or using any name or names, devices, artifices or contrivances, which may be calculated to represent that any product not of the plaintiff's production is the genuine Coca-Cola of plaintiff, and that writs of perpetual injunction issue accordingly.

(11) That defendants and each of them be required to account to plaintiff for any and all profits derived by them, or any or either of them, and to pay to the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that this cause be referred to a Master in Chancery of this Court, to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent to the taking and stating of said account for profits and damages, and to report said account and statement of profits and damages aforesaid as by law provided.

(12) That defendants pay the costs of this suit to be taxed, and that upon taxation plaintiff have execution therefor.

WM. H. SAWTELLE,

Judge.

Dated September 16, 1916.

APPENDIX III.

<p>The Coca-Cola Company,</p> <p style="text-align: right;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>The Southern Koke Company, Ltd., Crescent City Seltz & Mineral Water Company, James L. Wright and J. C. Mayfield,</p> <p style="text-align: right;"><i>Defendants.</i></p>	}	<p>No. 15,064.</p> <p>United States District Court, Eastern District of Louisiana.</p>
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This cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, for the reasons orally assigned with the reservation of the right to reduce same to writing in the event of an appeal herein, IT WAS ORDERED, ADJUDGED AND DECREED:

- (1) That the court has jurisdiction of the subject matter and of the parties to the suit.
- (2) That the word "Coca-Cola" is a valid trade-mark.
- (3) That plaintiff is the owner of and alone entitled to use the trade-mark "Coca-Cola" and that its goods alone can lawfully be sold under that name.
- (4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola".

(5) That the defendant, J. C. Mayfield, did not adopt or make use of the name “Koke” until the year 1909, and that the defendants had and have no right to its use.

(6) That the defendants have no interest in or claim to the trade-mark “Coca-Cola”, the Coca-Cola business or formula and the defendants claim of interest in the Coca-Cola business, the trade-mark “Coca-Cola” and knowledge of the Coca-Cola formula are without foundation.

(7) That the words “Koke” and “Dope” were adopted and used by the defendants with the deliberate purpose of

representing their goods to be the product and manufacture of The Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' product under the names "Koke" and "Dope" as and for Coca-Cola.

(9) That the defendant, James L. Wright, was not connected with the Southern Koke Company herein referred to in the bill of complaint at the time of the filing of bill of complaint; therefore, injunction is not granted against him.

(10) That the defendants, except as above, and each of them, have infringed the plaintiff's trade-mark and have been guilty of unfair competition with the plaintiff.

(11) That defendants, The Southern Koke Company, Crescent City Seltz & Mineral Water Company, and each of them, their officers, servants, agents, employes, attorneys, licensees, transferees and assigns, and each and all thereof, and all acting by or under their authority and J. C. Mayfield, his heirs, assigns and all persons claiming under or through him be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola" or any like word, or the word "Koke" or any like word, or the word "Dope", or any like word; from claiming or asserting any right in the name "Koke" or in the name "Dope", or interfering or threatening any prosecution, or interference with the use thereof as short names or nicknames of plaintiff's product, Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product not the plaintiff's, barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or repre-

senting that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup, or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula; from claiming any interest in or having had an interest in the Coca-Cola business, from claiming any knowledge of the Coca-Cola formula; from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of defendants and not of the plaintiff, and further, from doing any act or thing, or using any name or names, devices, artifices or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine Coca-Cola of plaintiff, and that writs of perpetual injunction issue accordingly.

12) That defendants, and each of them, may be required to account to plaintiff for any and all profits derived by them, or any or either of them, and to pay the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that in the event that the parties do not agree as to the amount this cause be referred to a Master in Chancery of this Court, to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent to the taking and stating of said account for profits and damages and to report said account and statement of profits and damages aforesaid as by law provided.

(13) That defendants pay the costs of this suit to be taxed and that upon taxation plaintiff have execution therefor.

May 24, 1917.

(Signed) RUFUS E. FOSTER,
Judge.

APPENDIX IV.

DECISION OF THE EXAMINER OF INTERFERENCES.

Final Hearing,
December 6, 1915.

JHD.

IN THE UNITED STATES PATENT OFFICE.

Composition No. 1424.

The Coca-Cola Company *vs.* Koke Company of America.

Application No. 71308, filed June 23, 1913, published December 9, 1913.

Refreshing Non-Alcoholic Beverage not in the nature of a food and a soda fountain syrup.

Messrs. Harold Hirsch, Frank F. Reed, Edward S. Rogers, F. L. Brown and Francis M. Phelps for the Coca-Cola Company.

Messrs. F. T. F. Johnson and Joseph W. Bailey for the Koke Company of America. Augustine B. Littleton on brief.

The applicant is seeking to register the word "Koke" as a trade-mark for "a refreshing non-alcoholic beverage not in the nature of a food and a soda-fountain syrup" (applicant's statement).

The opposition, as originally filed, was based upon the ground, briefly stated, that "Koke" is a

"Deceptive imitation in sound, appearance and suggestion of opposer's said trade-mark name, "Coca-Cola."

The ground of opposition now chiefly relied upon by the opposer (Opposer's brief, page 1) is

“that the mark of the applicant is deceptive and should not be registered because Koke is a common abbreviation of opposer's trade-mark Coca-Cola and a familiar nickname for opposer's product.”

The ground of opposition, in the form now relied upon by the opposer, was substituted, for that originally alleged, by an amendment to the notice of opposition, filed more than thirty days after the publication of the mark sought to be registered (Amendment filed August 3, 1914, and modified during the proceedings before the Commissioner on appeal).

It is urged, in behalf of the applicant (Applicant's Brief, page 108), that the amended notice of opposition sets up a new cause of action which was not pleaded in the notice of opposition as originally filed. This point was duly raised by the applicant when the motion to amend the notice of opposition was presented by the opposer and was decided in applicant's favor by this tribunal (Decision of August 21, 1914). On appeal, the decision of this tribunal was reversed by the First Assistant Commissioner, and the amendment, in a slightly modified form, was entered as a basis for further proceeding (Decision of September 5, 1914). The decision of the First Assistant Commissioner to the effect that the amended notice of opposition does not set up a new cause of action is controlling in its effect upon this tribunal. Further consideration of the merits of that question as a basis for the decision now to be rendered in this case would, therefore, be unwarranted.

The applicant contends that the amended notice of opposition does not state a valid cause of action (Applicant's Brief, p. 8.) It is urged that the only valid grounds for refusing registration are those defined in Section 5, of the trade-mark act of February 20, 1905 (as amended), and that the alleged use by the general public of the word “Koke” as an abbreviation of or nickname for “Coca-Cola” does not correspond

with any of the grounds named therein, but, at the most, amounts to nothing more than an allegation of unfair competition. This point was raised by the applicant in support of its motion to dismiss the opposition, filed September 18, 1914. In deciding that motion (Decision of October 3, 1914) it was ruled by this tribunal, without passing upon the merits of the specific question thus presented, that the amendments which had been made to the notice of opposition, were not such as to materially change the nature of the proceeding which, as originally filed, was based upon a satisfactory allegation of similarity between the words "Koke" and "Coca-Cola." The First Assistant Commissioner (Decision of January 13, 1915) affirmed the decision denying the motion to dismiss but based his action upon entirely different grounds. He overruled applicant's contention that an opposition should be dismissed unless the grounds set up as a bar to registration are found in Section 5 of the trade-mark act, and held that other grounds of damage may be relied upon as a basis for opposition under the broad provisions in Section 6. The question of opposer's right to rely upon the original allegation of similarity between "Koke" and "Coca-Cola" was not mentioned.

That an opposition may be sustained and registration refused on grounds other than those specifically defined in Section 5 of the trade-mark act has recently been decided by the First Assistant Commissioner in his decision in Opposition No. 1641, *Western Clock Co. v. Sears Roebuck and Co.* (117 MS. D., 465). In that case the opposer alleged that it had manufactured and sold clocks under the trade-mark "Big Ben," but that it had also advertised such clocks under the trade-name "National Call" which had become generally known to the public as an identifying name for opposer's goods. It was held by the acting examiner of interferences that the facts alleged in the notice of opposition, if established, would not constitute a statutory bar to the registration of the

name "National Call" to one who had used it as a trade-mark, because the ground of opposition relied upon by the opposer did not correspond with any of the reasons for refusing registration defined in Section 5 of the trade-mark act, and that no other grounds for refusing registration should be recognized by the patent office. The decision of the acting examiner of interferences in that case was reversed by the above cited decision of the First Assistant Commissioner, in which it was said:

"This case (*Western Clock Co. v. Sears Roebuck and Co., supra*) seems to be practically on all fours with that of *The Coca-Cola Co. v. Koke Company of America*, decided by me January 13, 1915."

Both of the above mentioned decisions of the First Assistant Commissioner are printed in full in Opposer's Brief (pp. 215 to 220).

In view of the above cited decisions of the First Assistant Commissioner, one rendered in this case, and the other in the case of *Western Clock Co. v. Sears, Roebuck & Co.*, a ruling by this tribunal to the effect that the amended notice of opposition does not state a valid ground of opposition, as contended by applicant, would be unwarranted. Applicant's alleged right to registration and opposer's alleged damage must therefore be determined from the evidence which has been introduced in support of the facts pleaded in the notice of opposition and applicant's answer thereto.

That the beverage for which applicant is seeking to register "Koke" as a trade-mark and the product which the opposer sells under the name "Coca-Cola" are merchandise of the same descriptive properties, as that term is used in trade-mark law, is not controverted. The decision to be rendered in this case is therefore dependent solely upon the alleged conflicting use of the marks "Coca-Cola" and "Koke" in connection with the manufacture and sale of such goods.

It is satisfactorily established by evidence introduced by both parties to this proceeding that "Coca-Cola" was made

and sold in small quantities by one J. S. Pemberton, of Atlanta, Georgia, at least as early as the year 1887. The Coca-Cola Company in its notice of opposition, alleged title through mesne assignments from said Pemberton. The applicant, in its answer, alleged that its predecessors in business, acquired some interest in Coca-Cola from the same J. S. Pemberton, and evidence has been introduced in support of such claim. According to this testimony J. S. Pemberton was doing business in 1887 under the name "Pemberton Chemical Company" and, as a part of that business, was making and selling Coca-Cola. In 1888 he entered into partnership with J. C. Mayfield, F. H. Bloodworth, and A. A. Murphy, after which the business was continued under the name "Pemberton Medicine Company." The applicant claims that the Coca-Cola business was understood to be a part of the consideration advanced by Pemberton when the partnership was formed. This claim, in behalf of the applicant, to the effect that a predecessor of the Koke Company of America, acquired some interest in the Coca-Cola business, as a result of a transaction which occurred in 1888, is held to be of no importance in view of testimony relative to subsequent events introduced and relied upon by the applicant. The substance of that testimony is to the effect that a controversy arose between Pemberton and the other members of the Pemberton Medicine Company soon after the partnership was formed at which time Pemberton announced that he had agreed to let his son have the Coca-Cola business (Applicant's Rec., pp. 391 and 777), and that, although the other partners did not consent to the surrender of Coca-Cola, they nevertheless agreed to adopt a different name for the product which had previously been sold as such (Applicant's Rec., pp. 391 and 778). That was in 1888 and there is no evidence of record that the applicant or any of its alleged predecessors afterwards used or attempted to use the name "Coca-Cola." If applicant's predecessors ever had any interest in the mark "Coca-Cola," as to which no opinion

need be expressed, it is held that they abandoned the same by intentionally and deliberately discontinuing its use in 1888 and by failing to resume such use during the following twenty-seven years (J. C. Mayfield, Sr., XQs. 1224, 1225). Moreover, the opposer has introduced testimony and documentary evidence relied upon to perfect a continuous chain of title to and continuous use of "Coca-Cola" from 1887 to the present time. That evidence has been abstracted and tabulated on pages 119 to 315 of opposer's brief. That it is sufficient for the purpose, if opposer's title to "Coca-Cola" is at all material to this case, appears to be conceded, and will be so regarded, since applicant has not questioned the same in its brief. It is therefore deemed to be unnecessary to make any detailed analysis of the evidence which has been introduced by the opposer to establish its title to "Coca-Cola" or of that which has been introduced in behalf of the applicant for the apparent purpose of impairing the same.

The opposer has not established, by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has even been misled as a result of any similarity or resemblance between the marks "Coca-Cola" and "Koke," into a purchase of applicant's goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark "Koke" bears to the mark "Coca-Cola." It is therefore held that the opposer is dependent upon the allegation of the amended notice to the effect that "Koke" is a common abbreviation and familiar nickname which has been adopted and used by the public as a means of distinguishing opposer's goods from other goods of the same descriptive properties.

The opposer has introduced the testimony of numerous

witnesses located in different sections of the country to the effect that customers at soda-fountains who ask for Koke accept Coca-Cola without objection. In many instances such customers, when asked if they meant Coca-Cola, answered in the affirmative. Some of the witnesses testified that, to their recollection, "Koke" had been used as a nickname for "Coca-Cola" for as much as twenty or twenty-five years. No attempt will be made to make a detailed analysis of the mass of testimony which has been introduced to establish this point of opposer's case. It is objected to by the applicant on the ground that it is the testimony of interested witnesses and to a certain extent that is true. Much of it is the testimony of detectives employed by the opposer and sent to different parts of the country for the express purpose of collecting evidence. Much of it is the testimony of customers of The Coca-Cola Company. Some of it must be entirely disregarded on the ground that it is mere hearsay. Some was properly objected to on the ground that it was given in response to leading questions. A large proportion of this evidence, however, is free from objection, other than that it is the testimony of witnesses who, as customers or employees, are more or less interested in the success of the Coca-Cola Company as a commercial institution. No good reason has been shown why such evidence should not be accepted as true. It has been abstracted and tabulated, for convenient reference, on pages 137 to 171 of opposer's brief. It has been satisfactorily rebutted and counsel for applicant do not contend that the word "Koke" has not been so used.

The argument relied upon by applicant is that "Koke" is in many instances used by the public in a generic sense as a name for any of fifty or more cola drinks which may be found for sale on the market (Applicant's Brief, pp. 162, 163, 167, 168) and that to such extent as "Koke" is used by the public as a name for "Coca-Cola" such use should not be regarded as having originated because of any similarity between the

marks "Koke" and "Coca-Cola," but because of an alleged general impression that "Coca-Cola" contained some sort of powerful, habit forming drug such as cocaine (Applicant's Brief, pp. 156, 157). (It will therefore be regarded as an established fact, for the purpose of deciding this case, that the word "Koke" has been used quite generally for many years in certain sections of the country, and particularly in Texas, as an abbreviation or nickname, intended to distinguish) opposer's goods from goods of like descriptive properties.

The arguments which have been advanced in applicant's brief (pp. 157, 163, 167, 168, 252), to the effect that "Koke" is a generic term used by the public as a nickname for any one of a class of fifty or more beverages to be found on the market, is based, in part at least, on testimony which is not a part of the printed record. By agreement of the parties, approved by the Patent Office, the testimony in this case was taken contemporaneously with the testimony in certain court proceedings pending between the same parties. Certain testimony taken by the applicant was not entitled as testimony to be used in this proceeding before the Patent Office. A type-written copy thereof was introduced by the opposer but was not printed. This testimony might have been used by either party, had it been printed as required by the rules. Because neither party printed the same it was ruled at the hearing, after reading the agreements relative thereto (Applicant's Rec., p. 66; Applicant's Brief, pp. 157 to 161), that the unprinted testimony should not be considered in behalf of either party to the interference.

Applicant's argument to the effect that "Koke" is a generic term used by many persons as a name for a class of drinks is not dependent solely upon the unprinted portion of applicant's record. Evidence in support of such a use of that term is to be found in the printed records of both parties (see testimony of Boylin, Qs. 52 to 64, Applicant's Rec., pp.

216, 217; Sidebottom, XQs. 110, 111, Applicant's Rec., p. 254; Brown, Q. 14, Opposer's Rec., p. 1039; Christy, XQs. 135, 136, Opposer's Rec., p. 1903). Moreover, to such extent as the use of "Koke" as a generic term or name for a class of drinks may be found to constitute a reason for refusing to register the same as a trade-mark, the use in that sense may be regarded as formally admitted by counsel for applicant (Applicant's Brief, pp. 157, 163, 167, 168).

In view of the rulings which have been made to the effect that the word "Koke" is used to a material extent by persons desiring to purchase Coca-Cola, and that the same word is frequently used as a generic term or name for a large class of drinks, the applicant's right to register is held to be dependent upon proof that "Koke" was used as a distinguishing mark for applicant's goods prior to the time at which the public began to use that word either as a nickname for "Coca-Cola" or as a generic name for any cola drink (*Stachelberg et al. v. Ponce*, 128 U. S., 686; 46 O. G., 337; *Corbin v. Gould*, 133 U. S., 303; 51 O. G., 622; *Denver Chemical Mfg. Co. v. Lilley et al.*, 216 F., 869). Even should it be found that applicant's alleged prior use is established by the evidence, applicant's right to register may be defeated by proof of abandonment at a subsequent date. The evidence bearing upon these features of the case will now be taken up for consideration.

The applicant has introduced testimony to establish an adoption and use of "Koke" as a distinguishing mark for goods sold by its predecessors as early as the year 1888. If such use is established it would doubtless entitle applicant to register in the absence of evidence of abandonment. Few of the many witnesses who testified as to the use of the word "Koke" as a nickname for "Coca-Cola" attempted to carry such use back farther than from ten to fifteen years and such dates were not established by association with other events or by documentary evidence. A ruling that the word "Koke"

was so used to any material extent, prior to the year 1900 would doubtless be unwarranted in view of the testimony upon which it must be used. On the other hand the opposer contends that the use of "Koke" as a mark for applicant's goods is not established at a date earlier than the year 1909. Use of the word "Koke" at that late date would not entitle applicant to register because of the earlier use of the same word as a nickname for "Coca-Cola."

The history of the adoption and use of "Koke" as a name or mark for applicant's product, will first be very briefly outlined in accordance with the testimony of J. C. Mayfield, Sr., given during his examination as a witness for applicant. This witness, J. C. Mayfield, Sr., president of the applicant, Koke Company of America, will hereinafter be referred to as "Mayfield," as a convenient means of distinguishing between him and his sons, whose names will be given in connection with their respective initials.

According to Mayfield's testimony, the Pemberton Medicine Company of Atlanta, Georgia, at the time that partnership was formed, took over Pemberton's entire business, including the manufacture and sale of Wine of Coca, Coca-Cola, Globe Flower Cough Syrup, Indian Queen Hair Dye, and several other remedies and preparations. Mayfield testified that he got the Coca-Cola formula directly from Pemberton who explained it to him and permitted him to copy it in a note book. According to his testimony the Pemberton Medicine Company, as a part of its regular business, continued to manufacture and sell Coca-Cola for a few months, after which a dispute arose between Pemberton and the other partners, Murphy, Bloodworth, and Mayfield, as to the company's right to Coca-Cola, and before the end of the year 1888 it was decided that the company should discontinue the use of the name "Coca-Cola" and market the same product under the name "Koke." Before the end of that year Murphy retired and Pemberton died. A settlement was made for the purpose

of closing out the Pemberton interest as a result of which Mrs. Pemberton received the formula to the Indian Queen Hair Dye and one-third of the manufactured stock on hand. The business was then continued by Mayfield and Bloodworth.

Mayfield testified that at some time between the years 1890 and 1892, it was decided to get rid of the patent medicines and push "Koke" only. At about this time he claims to have met an old friend named Ealey who became interested in the "Wine of Coca" and in 1893 a separate company, the Wine of Coca Company, was organized to take over that preparation. In 1895, Mayfield claims to have bought out Bloodworth and to have continued the business in Atlanta as sole proprietor until about the end of the year 1898.

About the end of the year 1898 Mayfield claims to have left Atlanta. He first did a little manufacturing in New Jersey and between the year 1899 and 1909 he became interested in various business establishments in Birmingham, Nashville, and St. Louis. When he went to Birmingham, in 1899, he succeeded in interesting one Brittain in his new drink "Celery-Cola" with which he claimed to have been experimenting in Atlanta. He and Brittain then started a bottling business for the purpose of exploiting "Celery-Cola." From this time on Mayfield claims to have manufactured and sold both "Celery-Cola" and "Koke" continuously until 1909 in some one or more of the establishments with which he was connected in the above mentioned cities. That "Koke" has been used by Mayfield and the companies with which he has been associated since 1909 does not appear to be disputed (Opposer's Brief, p. 11). This admitted use of applicant's mark during the last six years and the various business organizations with which he has been associated in Texas, Louisiana, and elsewhere, are not at issue in this proceeding and need not be discussed.

That the Pemberton Medicine Company of Atlanta,

Georgia, made and sold, during the period from 1888 to 1898, in containers bearing the label "Koke," a product which was used in the making of a soda fountain beverage, is held to be established. This ruling is in no manner dependent upon the testimony of Mayfield himself. It is based upon the testimony of several competent witnesses including one of the original partners, Murphy, (Applicant's Rec., p. 393); a daughter and a son in law of another of the original partners (Banks, Applicant's Rec., pp. 516, 525; Miss Marian Bloodworth, Applicant's Rec., pp. 347, 351, 356, 357) and a friend who visited Mayfield from Alabama about 1892 or 1893 (Holley, Applicant's Rec., pp. 373, 374). These witnesses have not been impeached and there is no apparent reason why their testimony should not be accepted as true.

Evidence has been introduced in behalf of the applicant which is believed to warrant the conclusion that Mayfield continued to make and sell a beverage of some kind under the name "Koke" for a short period at least after he left Atlanta. McGraw, an Alabama bottler, testified (Applicant's Rec., pp. 421, 423) that he has bottled Koke purchased from Mayfield, "off and on" (Applicant's Rec., p. 422) ever since about the year 1900. He admitted that he had lost track of Mayfield at times and has been unable to get the product for periods of time, the extent of which is more or less uncertain. He testified, however, that he bottled and sold Koke during the years 1900, 1901, and 1902, and gave a list of several of his customers (Applicant's Rec., pp. 432, 433). It would seem that this testimony as to sales of Koke in 1901, 1902, and 1903, might have been rebutted if not true.

The applicant has introduced the testimony of numerous witnesses to the effect that he continued to manufacture and sell "Koke" during the years 1904 to 1909 when, according to his own testimony, he was most interested in "Celery-Cola" (Applicant's Rec., p. 906). The testimony of many of those

witnesses is too uncertain and indefinite to be given any weight as evidence.

Casey first testified that Mayfield was selling Koke twelve years ago (Applicant's Rec., p. 416). He then testified that he meant eight or nine years (Applicant's Rec., p. 418); then said it was "about eight years" (Applicant's Rec., p. 418); and admitted that he could not remember the year or date.

Sidebottom testified to knowledge of the use of Koke by Mayfield for eighteen years (Applicant's Rec., p. 246). On cross examination he cut the time down to twelve or fourteen years (Applicant's Rec., p. 258) and then admitted that he could not remember "Koke" but confused the same with "Cola" (Applicant's Rec., p. 259).

Freed, on direct examination, testified that he had bought Koke from Mayfield continuously since about thirteen years ago (Applicant's Rec., 262). On cross examination he first admitted that he did not know anything about "Koke" either as an extract or as a syrup until about seven years ago (Applicant's Rec., pp. 275, 276) and then admitted that he could not remember about "Koke" (Applicant's Rec., pp. 290, 293).

Mayfield's son, R. S. Mayfield, testified that his father continued to manufacture "Koke" at Birmingham until 1908 (Applicant's Rec., p. 545). Although he claims to have been on the road for his father from 1903 until 1908 (Applicant's Rec., pp. 545, 571, 581), selling Koke, Celery-Cola, etc. (Applicant's Rec., p. 588) he could not remember the names of any of the customers to whom he sold Koke (Applicant's Rec., p. 591).

Another of Mayfield's sons, J. W. Mayfield, also claims to have been on the road selling "Koke" for his father from 1903 to 1907 (Applicant's Rec., p. 641) but could not name any of their Koke customers (Applicant's Rec., pp. 686, 690).

But it is deemed unnecessary to make a detailed analysis of the many witnesses who were examined in behalf of the

applicant in view of the admissions and contradictory testimony of Mayfield, himself, through whom the applicant claims title, as its immediate predecessor. Mayfield is now the president of the Koke Company of America and must be regarded as having been at all times, since its first alleged adoption and use, the person most interested in the success of Koke. His conduct and admissions, so far as they raise presumptions which are against the interest of the applicant, must be regarded as of more weight than indefinite and conflicting testimony of other witnesses. It will be shown that his own testimony in support of the applicant's case must be ignored and that his conduct and admissions during the period from 1904 to 1909, and subsequent thereto, as established by the record, warrant the conclusion that he abandoned Koke some time between 1903 and 1909, during which period he was pushing Celery-Cola.

The conclusion that Mayfield is not to be relied upon as a witness in behalf of the applicant and that his testimony in support of applicant's case must be disregarded is clearly warranted in view of his answers to questions asked him when examined as a witness for the opposer during the taking of its testimony in rebuttal. The opposer had introduced evidence to the effect that in the year 1907 one of Mayfield's employees, Rice, had been prosecuted for the alleged theft from Mayfield of a formulae book and some of his stock in trade. On direct examination Mayfield was asked if he were present at the hearing of the case of *State v. Rice* and had answered (Applicant's Rec., p. 937) "No." After the opposer had established, by evidence in rebuttal, that Mayfield was present and testified in that case, Mayfield offered the explanation that the record is erroneous and that he had actually answered "Yes" (Opposer's Rec., p. 2694).

The opposer, in its brief (pp. 36 to 47), has tabulated extracts from Mayfield's testimony as a convenient means for comparing that which he gave in the case of *State v. Rice*,

with that given in this case; first, as a witness for the applicant, and subsequently as a witness in rebuttal for the opposer. It is unnecessary, however, to enter into any detailed discussion relative to the contradictions and inconsistencies to be found in Mayfield's testimony or of the testimony which he has submitted in explanation of the same. His conduct as a witness in rebuttal for the opposer, is alone sufficient to warrant the conclusion that his testimony cannot be relied upon. Although repeatedly cautioned that if he did not remember the facts he should so state (Opposer's Rec., pp. 2720, 2728, 2729), he persistently answered "Yes" when asked as to certain facts, at the same time admitting that he remembered nothing about the matter (Opposer's Rec., pp. 2746, 2747, Qs. 293 to 297; p. 2726, Qs. 357, 358; p. 2727, Qs. 365, 366; p. 2733, Q. 429; p. 2739, Q. 473). He apparently attached no importance to the fact that he was testifying under oath.

In his testimony in the case of *State v. Rice*, although Mayfield was subjected to an extensive cross-examination relative to his various formulas and as to the business of The J. C. Mayfield Manufacturing Company, he said not a word about "Koke." That was in 1907. He testified that at that time the company was doing nothing except to supply the Celery-Cola Company with its specialties, "Celery-Cola" and "Pep-sinola" (Plaintiff's Rebuttal Exhibits 4, 5, 6 and 7).

In 1911 Mayfield learned that the Murfreesboro Bottling Works, of Murfreesboro, Tennessee, was carrying on some kinds of a business under a registered trade-mark "Koke" (Applicant's Rec., p. 789). Mayfield's Company purchased that registration for a material consideration (Defendant's Exhibit No. 67) without entering into any contest, although Mayfield claims to have used the name "Koke" as a distinguished mark for his goods continuously since the year 1888. The earliest date of use alleged in the Murfreesboro registration is May 1, 1902 (Defendant's Exhibit, No. 129). Mayfield

admits that he took nothing from the Murfreesboro Bottling Works, as a result of this transaction, other than the certificate of registration. The business and formulae were not transferred (Applicant's Rec., pp. 860 and 923).

In 1913 Mayfield was notified that an application for registration of the word "Koke" as a trade-mark for a non-alcoholic beverage, was being prosecuted before the U. S. Patent Office by one William L. Bitting of Texas. Instead of contesting an interference with Bitting, whose earliest alleged date of use was November 10, 1898, Mayfield's Company bought Bitting's application and had the mark registered to the Koke Company of America as assignee (Applicant's Rec., pp. 829, 830, 923; Defendant's Exhibits No. 126 and No. 128). The applicant took nothing from Bitting in the nature of apparatus, labels, formulae or other tangible assets, is admitted (Applicant's Rec., pp. 921, 922). Applicant purchased nothing but the bare application for trade-mark registration together with a label registration owned by Bitting (Defendant's Exhibits No. 126 and No. 127).

In the fall of the year 1910, the Koke Companies, of which Mayfield was president, filed applications for registration of "Koke" as a trade-mark in twenty or more states of the Union (Applicant's Rec., pp. 830 to 835). Certified copies of several of these applications for state registration are found in the record (Plaintiff's Rebuttal Exhibits, No. 84 to No. 89). In each instance the application is verified by Mayfield and in no case did he allege a date of use earlier than June, 1909.

Although Mayfield claims to have manufactured and sold Koke continuously from 1888 up to the time when the Koke Company of America was organized in 1911 (Applicant's Rec., p. 808), including the period during which he was in business in Birmingham (Applicant's Rec., p. 785), the opposer has introduced as evidence in rebuttal the testimony of numerous witnesses to the effect that they were employees of

Mayfield's Birmingham companies and that they never heard of "Koke" during that period of employment. These witnesses include Mayfield's salesmen, bookkeeper, stenographer, labeler, chemist, bottlers, bottle washers, shipping clerk, delivery clerk, and draymen (See Opposer's testimony in rebuttal by Ellis, Barclift, Pogue, Moody, Hooper, W. M. Smith, Ensley, Dickson, Brewer, the Andersons, Crawford, Thomas, Benham, Barrow, Bevell, and Garrett). Mayfield's St. Louis salesman, Leaver, and his St. Louis chemist, Bohne, also disclaim any knowledge of Koke during their employment by the J. C. Mayfield Manufacturing Company in 1903 and 1904 (Opposer's Rec., pp. 1919, 1930).

The applicant has been unable to produce specimens of any labels, advertising, letter heads, bills, or other physical exhibits, illustrating the manner in which "Koke" is alleged to have been used prior to the year 1909. As evidence in rebuttal, the opposer, by subpoena *duces tecum*, introduced a number of letters, envelopes, and other papers of the J. C. Mayfield Manufacturing Company and of the Celery Cola Company, of Birmingham, Nashville, and St. Louis, bearing letters signed by Mayfield and dated 1904, 1905, and 1906 (Plaintiff's Rebuttal Exhibits, No. 11 to No. 60). In none of these papers does the word "Koke" appear, either in the heading or in the subject matter, although the name "Celery-Cola" is conspicuously set forth in most of them. That these letters are authentic is clearly established (Opposer's Rec., pp. 1558 to 1573 and p. 2765).

In one of the letters (Plaintiff's Rebuttal Exhibit, No. 12) which Mayfield admits (Opposer's Rec., p. 2765) having written to Pogue in 1905, he says, with respect to a case involving his Celery-Cola:

"We must win this case for Celery-Cola is my all."

In 1909 Mayfield and others were prosecuted by the United States Government under the "Food and Drugs Act" on the charge of misbranding in connection with sales of Celery-

Cola in interstate commerce (177 Fed., 765). The charge appears to have been based upon analyses by the government chemists who found that Celery-Cola contained cocaine and caffeine. With reference to this prosecution and its effect Mayfield says:

"Well, that went down against us, under those conditions, against Celery-Cola, which virtually murdered it unjustly. My competitors used it against us and I saw it was an uphill pull to try to overcome a thing of that kind. Well, we had had a good trade on Celery-Cola and a good trade on Koke, a pretty fair trade on Pepsi-Nola, and I made up my mind then to give my entire time, push and energy to Koke, because it had not had the black eye that Celery-Cola had." (Applicant's Rec., p. 787.)

And again about this same matter Mayfield testified as follows:

XQ. 845. And then some of you sent syrup to in barrels with labels on it, Koke labels on it?

A. I did not go into the syrup business very much until 1909 or '10 along there.

XQ. 646. That was when you went into the syrup business.

A. Yes, sir, largely into the Koke syrup business, that was when I had trouble with Celery-Cola and got a black eye, with cocaine in it, the government found it and then I thought I would naturally have to overcome that and I pushed Koke.

XQ. 647. But Koke had been your biggest seller up to that time?

A. I would not say that.

XQ. 648. How was the proportion between Koke and Celery-Cola up to the time you dropped Celery-Cola practically and took on Koke exclusively?

A. Well, Koke from '88 to 1900, we sold more possibly.

XQ. 649. That Celery-Cola?

A. Celery-Cola for several years, I believe was in the lead.

XQ. 650. That is, up to this suit?

A. Up to this suit, and since then we have done more Koke business because we have pushed it. (Applicant's Rec., p. 872.)

It is the opposer's contention that Mayfield, and the companies in which he was interested, used the name "Koke," for the first time, after the government prosecution, in 1909, with respect to the misbranding of Celery-Cola. It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word "Koke" as a name for a soda fountain beverage during the period from 1888 to 1903, after which Mayfield became most active in his efforts to promote Celery-Cola, but that any trade-mark right which may have been acquired during that period prior to 1903 was clearly abandoned during the following period from 1903 to 1909. Such abandonment of any prior use which may have been made is held to be satisfactorily established by the evidence. Any other conclusion is deemed to be untenable in view of Mayfield's testimony in the case of *State v. Rice, supra*, his affidavits in his applications for state registration, his purchase without contest of the Murfreesboro registration and the Bitting application, the absence of the word Koke in any of the letters and other papers introduced by Pogue (Plaintiff's Rebuttal Exhibits, No. 11 to No. 64), his admission in a letter to Pogue in 1905 that Celery-Cola was "his all," and the testimony of the Birmingham and St. Louis employees of the Mayfield companies to the effect that they never heard of the word "Koke" during their employment. This evidence is all consistent with the conclusion that Mayfield had abandoned any use which he had previously made of "Koke" as a trade-mark and that he readopted the same in 1909 only because the government prosecution against "Celery-Cola" discouraged him from thereafter attempting to market his goods under that name.

That the applicant acquired nothing by the purchase of the bare trade-mark registrations and application for registration, one from Murfreesboro Bottling Works and the other from Bitting, cannot be seriously questioned. It is so well settled that a trade-mark cannot be transferred, independently

of the business and good will in connection with which it has been used, as to render further discussion or the citation of authorities unnecessary.

The ruling which has been made herein, to the effect that applicant's predecessors made some use of the mark "Koke" and abandoned the same prior to its readoption by Mayfield in 1909, is of substantially the same effect in deciding this case as though it had been ruled, in accordance with opposer's contention, that the mark had never before been used. In 1909 it was too late for applicant to acquire the right to use "Koke" as a trade-mark "*Stachelberg et al. v. Ponce, Corbin v. Gould, Denver Chemical Mfg. Co. v. Lilley et al, supra*". At that time it was already, as established by the record in this case, a common nickname, throughout certain sections of the country, for opposer's goods. Moreover, according to applicant's own contention, the word "Koke" was then in common use, in many localities, as a generic name for any one of a large number of cola beverages, which alone would clearly bar applicant's right to register.

The opposer contends, and has introduced a large amount of evidence as proof, that the applicant has resorted to unfair and unlawful methods of marketing its goods as a competitor; that it has imitated opposer's product and the containers in which it is distributed and sold; that it has sought to induce retailers to wilfully and intentionally substitute and sell its product as that of the opposer; and that it has persistently harrassed those who will not do so. On the other hand, the applicant has submitted evidence to the effect that the opposer has attempted to monopolize the market and has resorted to threats and intimidating measures to prevent the sale by competitors of any product similar to Coca-Cola. Whether these alleged facts are material to the issues which have been raised in the court proceedings, in which the testimony submitted for use in deciding this case is also entitled, is a matter with which this tribunal is not concerned. Such

testimony is deemed to be entirely irrelevant to any issue which is properly raised for determination by the notice of opposition and has therefore been disregarded in deciding this case.

The opposition of The Coca-Cola Company is sustained, and it is adjudged that the applicant, Koke Company of America, is not entitled to the registration for which it has made application.

Limit of appeal: June 24, 1916.

H. E. STAUFFER,
Examiner of Interferences.

May 24, 1916.

APPENDIX V.

DECISION OF THE COMMISSIONER OF PATENTS.

Hearing
July 27, 1916.

J. R. S.

IN THE UNITED STATES PATENT OFFICE.

The Coca-Cola Company *vs.* Koke Company.

Opposition No. 1424.

Appeal from Examiner of Interferences.

Trade-Mark for Refreshing Non-Alcoholic Beverage not in the
nature of a Food and a Soda Fountain Syrup.

Application of the Koke Company filed June 23, 1913, No.
71,308, published December 9, 1913.

Messrs. Harold Hirsch and Frank F. Reed & Edward S.
Rogers, and Messrs. F. L. Brown and Francis M. Phelps
for The Coca-Cola Company.

Mr. F. T. H. Johnson for the Koke Company.

There has been much litigation bearing upon the matter here presented. In *United States v. Coca-Cola Company*, 241 U. S. 265, decided about a year ago, the case was remanded for further proceedings. The outcome of this case may affect the right of the company to apply the name "Coca-Cola" to its product which, I think, would affect the standing of the opposer. But this suit has not according to my latest information, though now under negotiation, been finally disposed of.

Of more direct bearing upon the issues here presented are two district court decisions. The first is the decision of Judge Sawtelle of the District Court of Arizona. The opinion is found in the brief of the Coca-Cola Company before the Commissioner, page 85. The decree was dated September 16, 1916. I understand that the appeal has not been disposed of.

The second decision was in the District Court for the Eastern District of Louisiana. The decree, by Judge Foster, is dated May 24, 1917, and a certified copy was filed with me on the first day of June, 1917.

In each of these decrees there are findings of fact that the word "Koke" is an abbreviation of the name "Coca-Cola" used by the public and by purchasers in designating coca-cola; that the Koke Company of America, and its predecessor, did not adopt or use the name "Koke" until the year 1909; and that it was adopted and used with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

In the brief for the Koke Company it is urged that the injury alleged by the opposer must arise from a mark which falls within the inhibition of Section 5 of the Trade-Mark Act. A motion was made by the applicant to dismiss the opposition for failure to state a cause of action. This motion was denied by the First Assistant Commissioner in an opinion dated January 13, 1915 (see Schedules referred to in the brief for the Coca-Cola Company, page 101).

I agree with the contention by the opposer that the mark sought to be registered is not a mark by which the goods of the owner of the mark may be distinguished from other goods of the same class; that it is in fact a mark by which, partly because of popular usage, the goods of the applicant would be confused with the goods of the opposer and that the opposer would therefore be injured by the registration of the mark within the meaning of the statute.

This disposes of the contention by the applicant that the op-

poser's case must fall because merely an allegation of unfair competition.

The opposer was permitted to amend his notice of opposition. (See the opinion of the First Assistant Commissioner dated September 5, 1914, in the Schedules in the brief for the Coca-Cola Company, page 145.) I agree with the First Assistant Commissioner that the purport of the original and amended notice is broadly the same and set forth in effect the same grounds of opposition.

While it is true that opposition proceedings under the statute are intended to be summary and the rule is, therefore, strict respecting the time within which they may be brought and respecting amendments after the statutory period has expired, yet I can see no reason for overturning the deliberate action of the office upon this point. Moreover, it would make little difference in the outcome so far as the Koke Company is concerned whether the point that the word "Koke" is not a distinctive name of the applicant's goods is pressed by an opposer or raised by the office of its own motion as a reason for refusing registration.

The finding of fact as to the use of the name "Koke" arrived at by the examiner of interferences is somewhat different from that by the District Courts indicated above. I do not think the difference in the conclusion reached by the examiner of interferences and by the courts important, in view of the showing as to the popular use of the word "Koke" whether as a nickname for "Coca-Cola," as insisted by the opposer, or as a slang name for a whole class of syrups in which caffeine is an ingredient, as contended by the applicant. In any event, the word fails to distinguish applicant's product. Nothing but a clear showing of continuous use, beginning before the word became common on the lips of the public, could justify the office in registering it.

In fact, it is not seen why anyone should wish to adopt such a trade-mark unless it were to justify the retailer in sell-

ing his goods on the ground that they were called for when, in fact, the customer had no such thought in mind in asking for a "Koke."

There is, in truth, much testimony to which attention is called in the brief filed on behalf of the Koke Company to just this general effect. I refer to the testimony cited or quoted on pages 167 *et seq.* under the caption, "The nickname or slang expression 'Koke' does not indicate or designate opposer's product exclusively—hence opposer will not be 'damaged' by the registration."

Of the cases cited the one which seems to me to come the closest is what is known as the "Denver Mud" case (*Denver Chemical Manufacturing Co. v. Lilley*, 216 Fed. Rep., 869.)

This, of course, was not a case of opposition or a question of registration. It did not involve the question whether "Denver Mud" was a proper trade-mark. It was merely a case of unfair competition. It was claimed by the appellant, who was the manufacturer of antiphlogistine, that if a customer should go into almost any drug store in almost any part of the globe and ask for "Denver Mud" he would be handed a can of antiphlogistine.

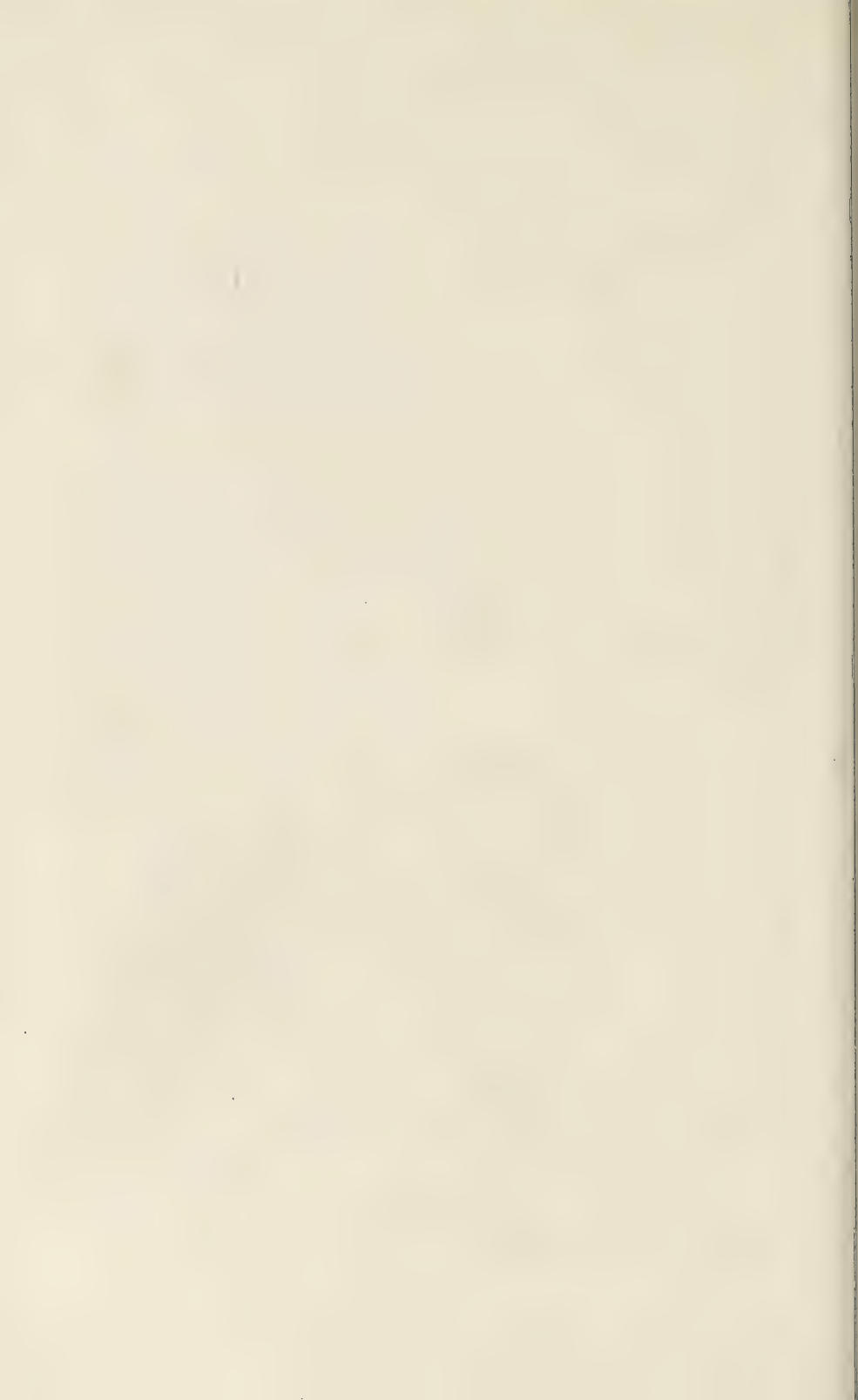
It was specifically held that the term "Denver Mud" was applied by the public to plastic dressings before antiphlogistine was placed on the market. Under this state of facts the conclusion was reached that the owners of the mark "Antiphlogistine" had not made out a case of unfair competition.

In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trade-mark the popular pseudonym for the goods which he sells. The answer must be in the negative.

The examiner of interferences is sustained.

THOMAS EWING,
Commissioner.

Aug. 14, 1917.



IN THE
United States Circuit Court of Appeals. 3
FOR THE NINTH CIRCUIT

THE KOKE COMPANY OF AMERICA,
THE SOUTHERN KOKE COMPANY, LTD.,
THE KOKE COMPANY OF TEXAS,
THE KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Defendants-Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,
Plaintiff-Appellee.

} Appeal from the United
States District Court
for the District of
Arizona.

SCHEDULES I, II, III, IV, V, VI AND VII TO THE BRIEF OF
THE COCA-COLA COMPANY.

WILLIAM K. WHITE,
Solicitor for Plaintiff-Appellee.

HAROLD HIRSCH,
FRANK F. REED,
EDWARD S. ROGERS,
Of Counsel.

FILED

MAY 1 1918

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SCHEDULE I.

The Coca-Cola Company's title to the trade-mark Coca-Cola and its business.

F. M. ROBINSON testified:

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Record.

347 I came to Atlanta in December, 1885, accompanied by Mr. D. D. Doe. Messrs. Pemberton, Ed. Holland, D. D. Doe, and I, then formed a stock company known as the Pemberton Chemical Company. He (Pemberton) put into the corporation several preparations the principal of which was "Pemberton's French Wine of Coca," which was a patent medicine selling at a dollar a bottle, and there was a preparation called "Gingerine," "Indian Queen Hair Dye" and "Pemberton's Globe Flower Cough Syrup." During that period Dr. Pemberton was continually experimenting on other drinks and chemical combinations.

We commenced making what we called "Coca-Cola" in May, 1886. I was assisting in the manufacture of "Coca-Cola" and in putting it on the market and selling it. Well, they continued in business, I suppose, a year after that, selling these various preparations, including, after May, 1886, "Coca-Cola." This product had no name in the beginning,—it was being experimented upon. Dr. Pemberton compounded a preparation, it was taken down to Mr. Venable's soda-fountain for the purpose of trying it to ascertain whether it was something the people would like or not, and, after they had made various changes
349 in the compound, it seemed to be satisfactory and then the question came up with reference to having a name for it. There were four of us in the corporation and they agreed to submit four names, each one of the members submitting a name. I submitted the name "Coca-Cola"

and it was afterwards adopted and used. The purpose of this drink "Coca-Cola" was to use it at soda-fountains as a beverage.

After being in, perhaps, something like a year, Doe sold out his Chemical Company interest, surrendering his stock and taking the printing enterprise and carrying it away with him. I do not know as anybody came in immediately after that, but subsequently a man by the name of M. P. Alexander came in. Well, after the preparation had been on sale by the Pemberton Company for possibly a year—they were manufacturing it and selling it as the product of the Pemberton Chemical Company—suddenly Dr. Pemberton announced he had secured a trademark on "Coca-Cola" in his own personal name and that it was not the property of the Pemberton Chemical Company, and that he had sold it to Lowndes and Venable. I thought he had no right to sell it, as I regarded it as property belonging to the Pemberton Chemical Company, of which I owned one-fourth interest; and I went to Judge
350 Candler, as an attorney, to see if he did not think I could have my rights maintained, and he looked into the matter, investigated it, and finally came to me and said Dr. Pemberton was not worth anything—there was nothing that was tangible in sight—and he advised me to drop it and give it up. Thereupon, I immediately went out, sold out my stock to Dr. Pemberton. After that I did not have any business until I came into the manufacture of "Coca-Cola" again, very shortly afterwards, for Walker, Candler & Company. I then went to work for Walker, Candler & Company, making "Coca-Cola" at 107 Marietta street, where the Pemberton Chemical Company had been all through their history, and we continued to manufacture "Coca-Cola" at the same place, but it was taken away from there temporarily. That is the only thing we manufactured at that time.

We continued right along with the tools and appliances that they had there with Walker, Candler & Company.

351 We used there the same appliances that had been used in the manufacture before—brought back from another place that formerly belonged to the Pemberton Chemical Company.

The paper Marked "Plaintiff's Exhibit No. 67," with the name of F. M. Robinson on the bottom of it, is my signature thereon. I witness that paper.

Woolfolk Walker and Mrs. M. C. Dozier signed that in my presence.

I continued the manufacture for Walker, Candler & Company as long as they together owned the preparation. After that I went with Mr. Asa G. Candler in his drug store and the materials and appliances were moved to the basement of his drug store—it was then, I believe, 63 Peachtree street, it is not the same number now. I continued the manufacture of "Coca-Cola" and also had charge of his city books in his drug store.

352 After I was with Walker, Candler & Company, I remained with Asa G. Candler continuously until the Coca-Cola Company was formed. No, sir, I did not continue in charge of the manufacturing of "Coca-Cola" except for a short time under Mr. Asa G. Candler, while he owned it, individually, at which time I was connected with the manufacturing of "Coca-Cola" and the keeping of the city books—while he was in the drug business. After he went out of the drug business I was the advertising manager. Immediately after I finished my work with Asa G. Candler, I went with the Coca-Cola Company. I held the office of Secretary of the Coca-Cola Company from 1892, the date of its organization, until last February (1914), twenty-two years. This product under the name "Coca-Cola," as I have described it, has been

353

known and sold under the name "Coca-Cola" continuously from 1886 up until the present time.

The product was never called "Coca-Cola Syrup and Extract" in any printing of any kind. He never had any labels printed at that time "Coca-Cola Syrup and Extract" that I remember. It was "Coca-Cola," nothing else.

354 I originated the word "Coca-Cola." I gave part of the reasons for that name in my testimony in the Patent Office.

The word "Coca-Cola" don't explain what there was in it. I know what the compound is and was. It is true that might have been one reason why the name suggested itself to me, was because of the fact that there was in it
355 the properties of "coca" leaves and of "cola" nuts and that may have been one reason why it was given that name; but the object in giving it its name was to have a name to be advertised by, and called for, and things of that kind, and not a description of the contents—there was dozens of other things that went into it that don't appear in the name.

356 I was out for a month or such matter after I left the Pemberton Chemical Company, and it was not very long until this Walker, Candler & Company started up—I don't think it was more than a month that I was out entirely.

358 When I quit the Pemberton Chemical Company and withdrew from it, Dr. Pemberton did not continue to manufacture "Coca-Cola." Before I left it was taken
away to Jacob's drug store, I think it was, that is, whatever they had for the purpose of manufacturing "Coca-Cola."

363 Dr. Pemberton sold the Coca-Cola business to Venable & Lowndes. It is my understanding that Venable & Lowndes actually took the business over. Pemberton

actually delivered the material for manufacturing "Coca-Cola" to Venable & Lowndes.

- 364 It went into the basement of Jacobs' drug store, in Venable's department at the corner of Marietta and Peachtree streets. From that place it went back again to 107 Marietta street and from there it went to Asa G. Candler's drug store, 63 Peachtree street.

S. C. DOBBS testified:

- 306 The first "Coca-Cola" I ever saw was in the spring of 1887. I was then in the shipping department of Asa G. Candler & Company. It came from what was at that time 107 Marietta street. In my visits to 107 Marietta street I saw Dr. Pemberton, Mr. F. M. Robinson, Charlie Pemberton and a man named Walker.

- 307-317 I saw advertising of "Coca-Cola" in 1888 and 1889 and from 1890 through to the present time "Coca-Cola" has been continuously advertised and continuously made and sold.

- 318 The business of the Coca-Cola Company consists of the manufacture and sale of a beverage known as "Coca-Cola," which it has been manufacturing and selling since its organization in 1892. Immediately preceding the Coca-Cola Company said beverage was manufactured by Walker-Candler & Company—Asa G. Candler, proprietor; and immediately preceding Asa G. Candler, proprietor, by Walker-Candler & Company; and previous to that, by Venable, Lowndes & Company, I believe, or Venable and Lowndes—it was George Lowndes and Willis Venable, and I believe, Mr. Walker.

I was in Atlanta all the time during 1887 and 1888. Quite frequently I went down to the place on Marietta street where "Coca-Cola" was manufactured to get something. The number of the house was 107. The equipment and machinery which Dr. Pemberton had for making

this stuff consisted of a copper kettle which held forty gallons and which was afterwards turned over to Mr. Asa G. Candler, and a wooden paddle.

330 I made a little trip, when Walker, Candler & Company owned "Coca-Cola" down the Georgia railroad for them, and Mr. Walker also traveled out through Alabama. I knew Mr. Walker quite well, and they had an old-fashioned Mathews bottling apparatus in a shed where this 107 Marietta street is, and some of the goods were sold in bottles then. The copper kettle, which I mentioned a while ago as having been delivered to Asa G. Candler, came from 107 Marietta street and is the one I referred to as having been used by Dr. Pemberton—it is the one that was in use down there when I first began going down there.

331 It was in 1888 when that forty gallon kettle was moved up there and we were putting up this "Coca-Cola" in red kegs. When I was with them, Mr. F. M. Robinson was doing most of the work. When I moved that kettle up from Marietta street to Peachtree street we also moved some material up there and some printed matter—odds and ends of advertising matter—and the small stuff that had been gotten out. Just everything that had anything to do with "Coca-Cola." We went down there with a one-horse dray; I remember the incident quite clearly though I do not remember the date.

Everything that had been used down there we moved to the basement of 147 Peachtree street—we cleaned the thing out and took it to 147 Peachtree street, which was the address of A. G. Candler & Company, wholesale druggists.

W. E. VENABLE testified:

388 I have lived in Atlanta since January, 1867. Exhibit 78 shows the sale of a part interest in Coca-Cola from John S. Pemberton to George S. Lowndes and myself, and Exhibit 79 shows the property that was turned over to us when we purchased the interest from Pemberton. Exhibit 80 shows a change that was made in the original agreement between Lowndes, Pemberton and myself. Exhibit 81 is a letter that I wrote to the Pemberton Chemical Company on April 11, 1887, showing my use and sale of Coca-Cola, and Exhibit 82 shows the sale of Mr. 389 Lowndes and myself to Mrs. Dozier and Woolfolk Walker. I knew Dr. J. S. Pemberton and I knew him well, and he was the first one that ever approached me in regard to the drink Coca-Cola. At that time I could not remember the name Coca-Cola and had to write it down in order to do so. After Mr. Lowndes and myself purchased our interest in Coca-Cola, we took over the property described and commenced the manufacture of Coca-Cola, and when we sold out to Woolfolk Walker and Mrs. Dozier, we transferred that property to them. I manu- 390 factured the Coca-Cola syrup at the corner of Marietta and Peachtree street in the basement of Jacob's drug store. Ever since then I have been continuously selling Coca-Cola.

GEORGE S. LOWNDES testified:

514 I have resided in Atlanta since 1869. I knew Dr. Pemberton in a business way and socially. We boarded at the same house, and I purchased with Mr. Venable a two- 515 thirds interest in the Coca-Cola business, and the purchase as shown by Exhibit 78 and Exhibit 80 shows the property that was turned over to Mr. Venable and myself by Dr. Pemberton. Exhibit 96 was addressed to me and

was a request for some money, which was turned over to Dr. Pemberton. I saw Mr. Venable manufacture Coca-Cola and that was at the corner of Peachtree and Marietta streets. After the sale to Walker & Dozier, I did not see the property any more. We turned over any material that we had on hand to them. The stencil that is set out in the bill of sale is what we put the name Coca-Cola on boxes, barrels and kegs with and which we used for advertising purposes.

JOSEPH JACOBS testified:

409 I have lived in Atlanta thirty-six years, and I have known of Coca-Cola nearly ever since I was in Atlanta, and it is manufactured by The Coca-Cola Company. I signed Exhibit 76, which shows the sale of the interest of Walker, Candler & Company in Coca-Cola to Asa G. Candler.

ASA G. CANDLER testified:

372 Exhibit 73 shows the sale by J. S. Pemberton of his remaining one-third interest in Coca-Cola to Walker, Candler & Company. Exhibit 74 shows the sale by Mrs. Dozier and Woolfolk Walker to me of their rights and interests in Coca-Cola. Exhibit 75 shows the sale of my
373 interest in Coca-Cola to The Coca-Cola Company. I knew Dr. J. S. Pemberton and I was a member of the firms of Walker, Candler & Co., and in 1892 I formed the corporation known as The Coca-Cola Company. I have been president of that company since its organization and have been actively in charge of its business and the business of the company has been the manufacturing and selling of Coca-Cola, and which said products has been extensively
374 advertised. When I owned the Coca-Cola individually, F. M. Robinson was continually with me. He at-

tended to the manufacture and as far as I can recollect that was so during the time I was a member of the firm of Walker, Candler & Company.

Attached hereto is a tabulation of The Coca-Cola Company's title as shown by its witnesses with the exception of Mrs. M. C. Dozier, who was a witness on behalf of the Koke Companies, and whose testimony will be hereafter referred to. Here also is shown in this Schedule the advertising and sale of Coca-Cola.

For the convenience of the court, we herewith give a summary of the pages of the record and the names of the witnesses who testified concerning The Coca-Cola Company's chain of title:

Name of witness.	Record Pages.
S. D. Dobbs,	305, 306, 318, 330, 322, 331, 332
(Cross-examination)	327, 330, 331
F. M. Robinson	347, 348, 349, 350, 351, 352, 353, 363, 364
(Cross-examination)	353 354, 355, 356, 358
Asa G. Candler	372, 373, 374
W. E. Venable	388, 389, 390
Joseph Jacobs	409, 410
George S. Lowndes	514, 515, 516

EXHIBIT 78.

Whereas John S. Pemberton, of the City of Atlanta, in the County of Fulton and State of Georgia, is the owner of a formula for Coca-Cola Syrup and Extract, and did, on the 28th. day of June 1887, register in the United States Patent office a Label, under the title of Coca-Cola Syrup and Extract, Number 5272, and

Whereas Willis E. Venable and George S. Lowndes, both of the same place, are desirous of acquiring an interest in said formula and registration:

Now therefore, This Indenture WITNESSETH, - that for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, as well as in consideration of an advance or loan of \$1200.00 without interest, but which is to be refunded to said ~~Lowndes~~ & Lowndes & Venable out of my share of profit in the hereinafter mentioned business; and in further consideration of the said Lowndes & Venable furnishing the necessary capital to conduct said business without charging interest therefor;

I, the said John S. Pemberton, do hereby sell and assign a two-thirds interest in and to said registered label to the said Willis E. Venable and George S. Lowndes, and the sole right to manufacture, sell and control the business and use the said label for the benefit of the parties concerned, for and during the full term of said registration or any renewal thereof, and further agree to furnish said Venable and Lowndes all knowledge and information necessary for the manufacture of the said Coca-Cola Syrup and Extract.

And it is agreed by and between the parties hereto that said Lowndes & Venable shall alone conduct the business of manufacturing and selling said Coca-Cola Syrup and Extract during the term of registration of said label.

It is further agreed that they shall take all the material and fixture said Pemberton has on hand that can be used in the manufacture of Coca Cola Syrup and Extract for the benefit of said business, paying the said Pemberton therefor original cost.

It is further agreed that said Pemberton shall receive one-third the net profits arising from said business, and that he shall have the privilege of drawing the same monthly.

This July 8th 1887

Witness

E. T. Holloman

Signed in duplicate
John S. Pemberton
W. E. Venable
Geo. S. Lowndes

EXHIBIT 78.

I hereby consent that Geo S Lawrence and
 Willis E Venable may sell and transfer
 their interest in within contract
 and subrogate the purchaser to all
 the rights powers privileges hereunder
 This Dec 13th 1887 J. S. Pemberton
 Witness

Noted & C. Ellis

EXHIBIT 79.

Venable & Lowmeyer		To Pemberton Chemical Co.	
✓	10 Gal. Coca Cola	90¢	\$ 9.00
	1 Brown Bottle		30.00
	1 Grate		4.32
	Brick		5.68
✓	1 Shovel Plate, Coca Cola		78
✓	8 lbs. Phosphoric Acid	2.20	2.20
✓	5 oz. oil Nutmeg	40¢	2.00
✓	1/2 lbs. Phil. Extr. Nutmeg		1.30
✓	500 Small Can Signs		6.00
	1 " " Wood Engraving		12.00
✓	2 Electro		1.40
✓	1600 Posters		6.00
✓	1 Large " Wood Cask		8.00
✓	14 oil Cloth Signs		14.00
✓	60 Tin Cases (1 Gal.)	15¢	9.00
✓	40 lbs Phil. Ex. Coca Leaves		40.00
✓	45 Coca Tin Signs		4.60
✓	1 Thin Gal Keg		.90
✓	1 white Wash Pot		.50
✓	1 Wood Cut (1 in Electro)		1.00
✓	1 Perculator		1.50
✓	5 oz oil Spice		1.00
✓	15 " " Lemon		2.80
✓	3/4 " " Coriander		1.25
✓	1 " " Cassia Tree		1.20
✓	10 " Ex. Vanilla		.60
✓	5 " oil Nutmeg		2.00
✓	5 lbs Citric Acid		2.75
✓	1 lb. Elis. Orange		.80
✓	20 oz. Marché Caffein		18.86
✓	3 Cloth Filters		.75
✓	3/4 oz oil Neroli		3.67
	Amount will send.		74.21
			\$ 268.29

EXHIBIT 79.

21
 To Amount brok. over \$268.29
 ✓ 5 M Coca Cola Cards (Geo) \$15.00
 \$283.29
 1887
 July 21 By Cash \$150.
 " 30 days Acct 133.29
 283.29 \$283.29
 J. B. Pemberton
 Pres.
 Pemberton Chemical Co.

EXHIBIT 80.

#10 ALEXANDER, J. S. PEMBERTON, 2111
 President, Secretary
 J. M. ROBINSON, Secretary
 Pemberton's
 French Wine, Globes Flower, Tough Spices, Indian Queen Hair Dye, Coca-Cola Syrup, Manufacturing Chemists, Sole and Proprietors of, Pemberton's French Wine Coca.
 • GINGERINE.

Atlanta, Ga. July 13 1887
 This Agreement witnesses that
 W. E. Vinable & Co. & Lowndes agree
 that the sum of hundred dollars
 advanced by them to J. S. Pemberton
 as per agreement and transfer
 bearing date July 8th 1887 and
 signed by said Vinable & Lowndes
 Pemberton shall be paid back to
 said Vinable & Lowndes out of
 the first profits arising from
 the sale of Coca Cola in all the South
 and not, out of ^{entirely} J. S. Pemberton's
 profits ~~as~~ as is now made
 in above mentioned contract.
 W. E. Vinable
 Geo. S. Lowndes

EXHIBIT 82.

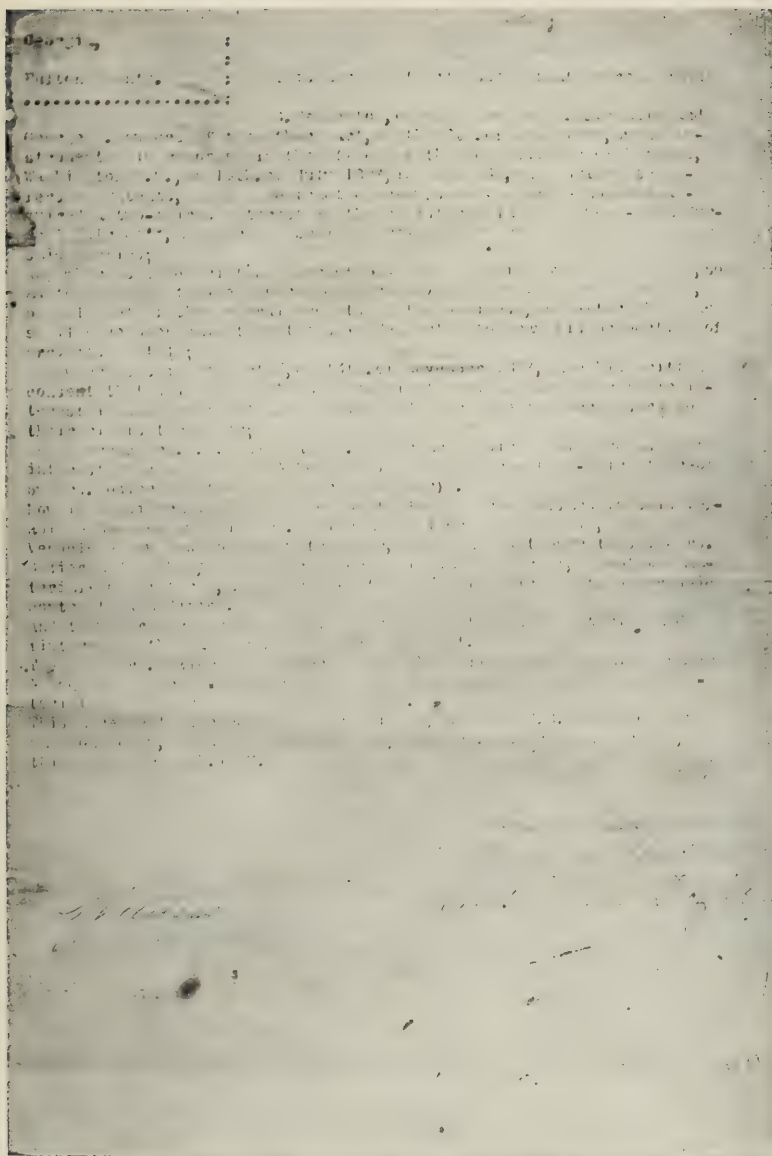


EXHIBIT 74.



EXHIBIT 73.

in County } know all men by these
 Pambulan & C Pambulan of said
 State & County have this day sent
 to Walker Candler & Co. Comptroller
 of Norfolk District - A & Campbell
 and Joseph Jacobs - New York
 Reg'd. Hill & Pambulan in quick
 to the Patent - A & Campbell
 as the Coca Cola - made and
 Her Appurtenances and reg'd.
 them to belonging. In the sum
 of five hundred ~~one~~ fifty dollars
 fully to be paid this day - and
 balance in C & A's place at
 30 days - This April 19th 1888.

W. H. Green
 T. W. Green & Sons

J. H. Green

EXHIBIT 75.



Schedule I.

21

TABULATION OF THE COCA-COLA COMPANY'S TITLE TO COCA-COLA, ADVERTISING AND SALES

Date	Manufactured By	Owner	Location	Witness	Record Page	Sales Per Gallon	Record Page	Advertising	Record
May, 1886	Pemberton Chemical Co.	J. S. Pemberton	107 Marietta St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs }	348, 349, 303	25 or 30 to Feb., 1887	353-7	\$73.00	Ex. 69, p. 351
To		J. S. Pemberton							
July 8, 1887	W. E. Venable	W. E. Venable	Marietta and Peachtree, Atlanta, Ga.	{ W. E. Venable Geo. S. Lowndes }	360, 315	1019	{ Ex. 70, p. 352 & 307 Ex. 71, p. 352 }	\$25.05 to April 1, 1887	Ex. 69, p. 351
To		Geo. S. Lowndes							
Dec. 14, 1887	Woolfolk Walker	Woolfolk Walker	107 Marietta St., Atlanta, Ga.	Mrs. M. C. Dozier	1829,				
To		Mrs. M. C. Dozier							
Apr. 14, 1888	Woolfolk Walker & Co.	Woolfolk Walker	107 Marietta St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs }	350, 330				
To		Mrs. M. C. Dozier							
Apr. 17, 1888	F. M. Robinson	Woolfolk Walker	63 Peachtree St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs A. G. Candler }	350, 351, 331, 371	1,933 1,233	307 & Ex. 71, p. 352	For Record in Book 1887, 1888, 1889 1890, 1891	Ex. 69, p. 351
To		Mrs. M. C. Dozier							
Aug. 30, 1888	F. M. Robinson	Walker, Candler & Co.	63 Peachtree St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs }	351, 352, 331				
To		Asa G. Candler							
1890	F. M. Robinson	Walker, Candler & Co.	63 Peachtree St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs }	351, 352, 331	2,171	307 & Ex. 71, p. 352		
To		Asa G. Candler							
1890	F. M. Robinson	Walker, Candler & Co.	63 Peachtree St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs }	351, 352, 331	8,885	307 & Ex. 71, p. 352		
To		Asa G. Candler							
Apr. 22, 1891	F. M. Robinson	Asa G. Candler	63 Peachtree St., Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs }	351, 352, 331	19,891	307 & Ex. 71, p. 352		
To									
Feb. 22, 1892	F. M. Robinson	The Coca-Cola Co.	Atlanta, Ga.	{ F. M. Robinson S. C. Dobbs A. G. Candler C. H. Candler }	352, 331, 374, 305	35,360	307 & Ex. 71, p. 352	\$ 11,306.78	307, 308
1893	The Coca-Cola Co.	The Coca-Cola Co.	Atlanta, Ga.			48,554	48,127	307 & Ex. 71, p. 352	12,795.12
1894	"	"	"			63,933	61,333	307 & Ex. 71, p. 352	14,538.14
1895	"	"	"			74,479	70,211	307 & Ex. 71, p. 352	17,744.22
1896	"	"	"			116,192	117,636	307 & Ex. 71, p. 352	23,117.58
1897	"	"	"			167,681	164,297	307 & Ex. 71, p. 352	52,093.18
1898	"	"	"				211,008	307 & Ex. 71, p. 352	30,887.62
1899	"	"	"				281,055	307 & Ex. 71, p. 352	48,394.63
1900	"	"	"				320,877	307 & Ex. 71, p. 352	84,505.97
1901	"	"	"				468,111	307 & Ex. 71, p. 352	100,276.01
1902	"	"	"				677,515	307 & Ex. 71, p. 352	149,628.79
1903	"	"	"				881,421	307	200,941.40
1904	"	"	"	Asa G. Candler	373		1,133,787	307	280,985.12
1905	"	"	"				1,548,888	307	356,552.67
1906	"	"	"				2,107,901	307	480,553.47
1907	"	"	"				2,558,782	307	550,775.22
1908	"	"	"				2,877,732	307	624,077.70
1909	"	"	"				3,486,526	307	675,048.59
1910	"	"	"				4,190,149	307	850,386.03
1911	"	"	"				4,815,677	307	978,329.00
1912	"	"	"				5,504,956	307	1,182,237.29
1913	"	"	"				6,767,822	307	1,189,210.89

SOLD AT 22 F

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ADVERTISING AND SALES OF COCA-COLA.

(a) As testified to by the witnesses for The Coca-Cola Company:

There is really no dispute concerning the amount and the extent and method of the advertising of Coca-Cola. It is shown conclusively that Coca-Cola is sold and advertised extensively, not only in every state in this Union, but in many foreign countries. The extent, the amount and the use of the advertising is set out conclusively in the record. See the following testimony:

Name of Witness.	Record Page.
S. C. Dobbs	398-318
(With this witness the different specimens of advertising were introduced.)	
F. M. Robinson (Early advertising)	352
St. Elmo Massengale	411, 412
Nick D. Chotas	447
G. A. Harbour	457
I. L. James	460
Alexander Cruickshank	463
Charles Kingsberry	465
F. H. Smith	468
D. G. Wise	474
J. F. Redding	479
L. Stephens	484
John Mehos	511
Clyde Park	512
G. H. Upchurch	522
Robert Chidsey	558
C. G. Peters	654
P. A. Capdau	664
W. H. Flowers	676
Albert J. Miller	680
Fred Schwartsenburg	681
R. W. Brown	682
T. J. Britton	829
See generally the testimony of:	
D. E. Bolton	407
T. L. Boswell	428
T. M. Murphy	502
F. C. Peace	706
Sam Friend	848

SCHEDULE II.

KOKE AND DOPE MEAN COCA-COLA.

The following is an excerpt from the record of the testimony with respect to the word **Koke** as an abbreviation of the name **Coca-Cola** and **Dope** as a nickname for **Coca-Cola** and establishes that these words are short names used by purchasers in ordering and designating **Coca-Cola**.

GEORGE ALFRED HARBOUR (Rec., 456), Atlanta, Georgia, proprietor of Harbour's Smoke House; has conducted a soda fountain for five years and a half:

457 "Well, almost six or eight people out of ten often ask for 'Coca-Cola' under the name of 'dope.' Yes, sir; I recognize 'dope' as a nickname for 'Coca-Cola.' * * * I don't know that I ever called 'Coca-Cola' by the names 'koke' or 'dope' before I got in business—I may have. Of course, I call for it now under that name myself and I suppose ever since I can remember I have known it as 'dope.' However, I have noticed it more since I have been in business than I ever did before because I have been in closer contact with it now."

I. L. JAMES (Rec., 460), Atlanta, Ga., drug business:

460 "I have heard them come in and ask for 'Coca-Cola' by asking for 'dope' and 'koke' and different things. When they ask for 'dope' and 'koke' I give them 'Coca-Cola.' I understand 'dope' and 'koke' to be a nickname
461 for 'Coca-Cola.' Why, I guess I have heard the names 'koke' and 'dope' as nicknames for 'Coca-Cola' about five or six years."

ALEXANDER CRUICKSHANK (Rec., 463), Atlanta, Georgia,
cigars and soda water; five stores:

463 "I am around the fountains in my various stores, and
have been, and hear people asking for drinks. I have
464 heard them ask for 'Coca-Cola.' They use a number of
nicknames in asking for it. 'Dope' is the principal one, I
think. Yes, sir; I heard the word 'koke.' When a man
asks for 'koke' and 'dope' I understand that he wants
'Coca-Cola.' I regard the names 'koke' and 'dope' as
familiarily used nicknames for 'Coca-Cola.' I couldn't
tell you positively how long these nicknames have been
used; to my certain knowledge they have been used at
least eight years. They are very commonly used to the
extent, I should judge, that sixty per cent. of the people
that drink 'Coca-Cola' call it by a nickname of some
kind or other—'Candler's cocktail,' 'brick from the Candler
building,' 'Candler's highball,' 'dope,' and 'koke.'"

CHARLES KINGSBURY (Rec., 465), Atlanta, Georgia, cigar
and soda water business:

"'Dope' is the principal name that is used in calls at
my fount for drinks, and 'Candler's highball' and 'give
me a brick in the Candler building'—all that kind of stuff.
When people come into my place of business and call for
'dope' and 'koke,' I understand them to mean 'Coca-
Cola.' Ever since I have been in business they have
been calling it by that way—about six years."

F. H. SMITH (Rec., 468), Atlanta, Ga., soda water busi-
ness for ten, twelve or fourteen years:

468 "Oh, yes, when people mean 'Coca-Cola' they use
469 nicknames and slang terms, such as 'dope' and 'koke'
and 'Candler's whiskey,' and 'Candler's Highballs'—I

don't know, most anything you can think of. When they ask for 'dope' or 'koke' I understand that they mean 'Coca-Cola,' and that is what I serve them. Half of the people in Atlanta will ask for 'Coca-Cola' by the name of 'dope'—'give me a dope,' half of them will say, instead of 'Coca-Cola.' I recognize the words 'dope' and 'koke' as commonly used nicknames for 'Coca-Cola.' I drank 'Coca-Cola.' I used to ask for it as 'dope' and 'koke'—everything else—it has been known as 'dope' ever since I have known 'Coca-Cola.' ”

DR. J. D. T. LAWRENCE (Rec., 470), Atlanta, Ga., soda fountain for nearly ten years:

- 471 “I hear them ask for 'Coca-Cola.' They use other terms when they mean 'Coca-Cola.' 'Dope,' I think, is the biggest word they use. When a man asks for 'dope' I give him 'Coca-Cola.' Well, I couldn't tell you how long 'dope' has been a nickname for 'Coca-Cola.' Seems to me I have heard it ever since I have been selling 'Coca-
- 472 Cola'—six or seven years, anyhow. * * * just a sort of nickname I always looked upon it, a man drinking a 'Coca-Cola,' they suppose it is something like coffee, I expect, and just call it 'dope.' ”

DR. F. F. LANGENFELDT (Rec., 473), manager of Palmer's drug store, Atlanta, Ga.:

- 473 “People sometimes ask for 'dope' and “'Coca-Cola.' I have occasionally heard them ask for 'koke,' very seldom though. When they ask for 'koke' or 'dope' I give them 'Coca-Cola.' Yes, sir; that is what I understand they mean by those expressions. I have known the name 'dope' as a nickname for 'Coca-Cola' ever since I have been in Atlanta,—for eight years I have heard people ask for it that way. * * * It's a nickname just like everything else.”

DAVID G. WISE (Rec., 474), Atlanta, Ga., for five years;
keeps two retail drug stores:

- 474 "There are nicknames used for 'Coca-Cola' at my soda fountain—they often come in and ask for 'dope' and 'koke' and I guess that's all. When a person comes in and asks for 'dope' and 'koke' I understand they want 'Coca-Cola.' I have known the names 'dope' and 'koke' ever since I have been in the drug business here. Yes, sir; as applied to 'Coca-Cola.' "

W. R. STOVALL (Rec., 476), in the soda business, Atlanta, Ga.:

- 477 "When people come into my store and ask for soft drinks they hardly ever call for 'Coca-Cola'—I don't suppose that ten per cent. of them ask for 'Coca-Cola'—they ask for 'dope.' Yes, sir, when a man asks for 'dope' I understand him to mean 'Coca-Cola.' * * * 'Dope' is a commonly used nickname for 'Coca-Cola' in Atlanta."

J. F. REDDING (Rec., 478), Atlanta, druggist:

- 479 " 'Coca-Cola' is asked for at my fount by other names, such as 'Asa G.' and 'shot' and 'dope' and 'koke,' and those names, and several others. When a man comes into my fountain and asks for 'dope' and 'koke,' 'Coca-Cola' is what I give him. Yes, sir, I understand that that applies to 'Coca-Cola.' Those names have been in use ever since I have been dispensing drinks."

CHARLES B. GIARDINA (Rec., 480), Atlanta; soda fountain and cigar business:

- 480 "When people mean 'Coca-Cola' they call 'dope' and sometimes 'koke' in calling for it at my store. When a

481 man calls for 'koke' or 'dope' I understand that he wants
 'Coca-Cola,' I don't handle any other drinks similar to
 'Coca-Cola.' * * * Some people say sometimes
 'give me a 'Coca-Cola' and they drink three and four
 times a day, sometimes twice a day and then next time
 they come in and say 'well, give me a 'dope'—you see?
 It's just that way."

W. A. MEDLOCK (Rec., 482), a druggist having three
 stores in Atlanta:

482 "I don't know how long I have known 'Coca-Cola,' I
 have known it almost since it came out. Well, I
 guess I have been drinking 'Coca-Cola'—I think I can
 safely say, for fifteen years. * * * You ask if peo-
 ple ever use nicknames when they mean 'Coca-Cola';
 well, they come in and call for 'Morning's Morning' or
 'dope,' about the only nicknames I know of. When a
 man asks for a 'morning's morning' or a 'dope' I under-
 stand that to mean 'Coca-Cola.' * * * Q. 22. Do you
 regard the word 'dope' as a familiarly used and common
 nickname for 'Coca-Cola'? A. Yes, sir."

LINTON STEPHENS (Rec., 484), Atlanta, Ga.; ten years a
 soda dispenser:

484 "I have known the drink 'Coca-Cola' about fifteen years.
 * * * Some call for 'Coca-Cola' and to make it short
 they call for 'dope.' I believe that is all I heard. I have
 only known the name 'dope' as applied to 'Coca-Cola'
 just a few years. When they ask for 'dope' they ask
 for 'Coca-Cola,' they don't ask for any other drink at
 485 all. They don't say 'Coca-Cola' because it is too long,
 they call for 'dope.' Yes, sir; it is just a nickname for
 'Coca-Cola.' * * * I have an idea why people and
 customers use the word 'dope,' they don't want to call

it 'Coca-Cola' because it is too long, possibly that's one reason they call it 'dope'—because that's been the nickname for it for several years—they call it 'dope' and when they call for 'dope' they don't want anything but 'Coca-Cola.' ”

GEORGE MOORE (Rec., 487), Atlanta, Ga.; business soda water supplies, and a retail place; also receives telephone calls for drinks:

- 487 “Yes, sir; I know the names people use when they mean to call for 'Coca-Cola.' All of my customers—I say all of them because I know them all and I have been there eighteen years at that corner, and I know them all—when they want 'Coca-Cola' they call 'give me a "Dope".' Sometimes they ask for 'Koke' or 'caffeine' and 'Candler's Highball,' they mean 'Coca-Cola' just the same, that's what they want—just a nickname they have for it—and even myself, I am ashamed to say it, myself the boss—when I want sometimes a drink, I say
 488 'give me a "dope" ' I just got the habit of it, I hate to say it, but I do it a good many times. Oh, I have known the word 'dope' as a nickname for 'Coca-Cola' a long time, since 16 or 18 years ago, almost since I have been at that corner. Q. 17. Do you recognize the word 'dope' as a nickname for 'Coca-Cola'? A. Why, yes, sir. Q. 18. Do your customers? A. The customers do. They don't mean nothing but a 'Coca-Cola' for a nickname for 'Coca-Cola,' they call it 'dope.' ”

PETE VERGE (Rec., 488) of Atlanta, Ga., cigars and soda water, testified that he had known of "Coca-Cola" for fourteen years:

- 489 “We have 'Coca-Cola' signs, you know, but people call different names, you know—call it 'dope'—of course,

when they say 'dope' we know they want 'Coca-Cola,' you know. Well, sometimes the boys call it 'Candler's highball,' but not as much as they do 'dope' in my place. They say 'dope' seventy-five times and 'Coca-Cola' twenty-five times. I understand the word 'dope' to mean 'Coca-Cola.' No, I never hear the expression 'koke,'—just 'dope,' you know."

W. N. TUMLIN (Rec., 490), of Atlanta, Ga., soda fountain;
has operated a soda fountain for about ten years:

- 491 "They use various names such as 'dope' or 'koke' or 'Candler's Highball.' I understand them all to mean the same thing—'Coca-Cola.' Q. 13. State whether or not from your experience the word 'dope,' 'Koke,' and 'Candler's Highball' are familiar nicknames for 'Coca-Cola' so used by the public and understood by the trade. A. It is. Well, the word 'dope' as a nickname for 'Coca-Cola' came into prevalent use about seven or eight years ago. I suppose seventy-five per cent. of my trade would designate 'Coca-Cola' by some nickname. About sixty per cent. of that seventy-five per cent. would be 'dope,' some 'koke' and some 'Candler's Highball.' "

W. A. HARTMAN (Rec., 492), 173 Ashby street, Atlanta, Ga., in the cigar and soda water business; has known of "Coca-Cola" for fifteen or sixteen years:

- 492 "You ask what names are used in designating 'Coca-Cola' at the fountains I have been to, besides 'Coca-Cola'; well, it's called 'dope'—I get orders over the telephone, 'Send me a "dope" and lime' or 'A "dope" and orange.' I have occasionally heard the name 'koke' used, but not very much, not as much as I have 'dope.' I understand the names 'dope' and 'koke' to mean and apply to 'Coca-Cola' and 'Coca-Cola' is what I serve in response to such requests."

DR. T. C. MARSHALL (Rec., 493), Atlanta, Ga., druggist, testified that he has known of "Coca-Cola" for twenty odd years:

494 "The other names that are used at the fountains, that I am acquainted with, in calling for 'Coca-Cola' are 'Coca-Cola,' 'dope,' 'koke,' and 'shot in the arm.' I have known 'dope' ever since I have been serving it. 'Koke,' though, hasn't been used but about the last ten years to much extent. I understand the names 'koke' and 'dope' to mean 'Coca-Cola,' and that is what I serve when those names are asked for."

J. B. PRENDERGRAST (Rec., 496), druggist, of Atlanta, Ga., testified:

496 "You ask if I know the names people use when they mean 'Coca-Cola'; well, the one we get most is 'dope.' When a man asks for 'dope' at my soda fountain I understand that he means 'Coca-Cola' and always furnish 'Coca-Cola' on such calls. No, sir; I have never had any one to turn it back and say it was not what was wanted. Yes, sir; I have heard the word 'koke' as a nickname for 'Coca-Cola' but not recently; it was several years back they used that a good deal. It meant, as applied to a
497 soft drink, 'Coca-Cola.' Well, as far as I remember I have heard the nickname 'dope' as a nickname for 'Coca-Cola' at least ten years. All that time we considered it a nickname for 'Coca-Cola.' Q. 22. You consider that as a definite request for 'Coca-Cola'? A. Yes, sir; we get it—we get calls for 'Candler's Highball,' 'Candler's "dope,"' but I think, though, half of them call for 'dope' meaning 'Coca-Cola.' * * *
498 Irrespective of what I may have at my fountain I consider these various expressions, 'koke,' 'dope,' 'Candler's Highball,' 'brick in the Candler building' as

definite designations of 'Coca-Cola.' They are all expecting 'Coca-Cola'; that is what they all want; we never have any comment of any kind on it; they were always expecting 'Coca-Cola'; that is our understanding of it. If I were to meet a friend on the street and he would say to me 'Let's go into this soda fountain and have a "dope," ' I would understand that he was talking about 'Coca-Cola,'—that he was asking me to have a 'Coca-Cola' with him."

G. H. UPCHURCH (Rec., 521), drug business, Mobile, Ala.; president and manager of the Bienville Pharmacy, Inc.; in the drug business for the past nine years in Mobile; before that in Tuscaloosa, Ala., and Carrollton, Ala., testified:

- 522 "Now, I don't know that I can relate all of the nicknames for 'Coca-Cola,' but the two most frequent are 'koke' and 'dope.' Now, I couldn't answer, either, as to how frequently the words 'koke' and 'dope' are used as nicknames for 'Coca-Cola' but I would say the larger per cent. of the time—that is, the larger per cent. of the calls come under the head of 'dope' or 'koke,' or some nickname. When a man comes into my store and asks for a 'dope' or a 'koke' or says 'Give me a "dope," ' or
- 523 'Give me a "koke," ' I understand that he means 'Coca-Cola' and supply 'Coca-Cola'—those are my instructions to all the men at the fountain. No, sir; I have never known of any instances where the purchaser has rejected 'Coca-Cola' saying it was not what he wanted when we served it in response to such requests for 'dope' or 'koke'; on the contrary I have frequently asked the question as to what they mean and invariably they state 'Coca-Cola.' Well, I don't know exactly how long the nicknames 'koke' and 'dope' have been applied to 'Coca-Cola' but I expect, as I stated in my letter, nine

or ten years, and I expect longer than that, but I think I can safely say nine or ten years to my own knowledge.

530 * * * The two names 'dope' and 'koke' are inseparably connected in my association with 'Coca-Cola'—in my estimation they mean 'Coca-Cola.' * * * You say you suppose that when I first heard the word 'dope' or 'koke' applied to 'Coca-Cola' that I thought it was because it had cocaine or some extract of cocaine in it; well, I didn't know why it was called that. The only thing I knew it was a nickname for 'Coca-Cola.' "

DAVE S. BAUER (Rec., 533), has been a retail druggist in Mobile, Ala., for twenty odd years. During that time has handled and dispensed "Coca-Cola":

534 "I have heard 'Coca-Cola' named 'dope,' 'koke' and other names. I think people use nicknames for 'Coca-Cola' more so than they call for 'Coca-Cola.' * * * You ask how long I have known the nickname 'koke' and 'dope' familiarly applied to 'Coca-Cola'; seems to me always, since I have been around the soda fountain, 25 or 26 years—24 years to be exact."

E. R. ALBRIGHT (Rec., 545), a druggist of Mobile, Ala. Member of the firm of Albright & Wood, who operate two stores, testified:

545 "I know of nicknames for 'Coca-Cola,' that are commonly used; namely, 'dope.' Well, I have heard of 'koke' yes, sir, but not as frequently as 'dope.' * * *

548 Why, I should say I have known the nicknames 'koke' and 'dope' to be applied to 'Coca-Cola' about eight

549 years—eight or ten years. I know that I drink 'Coca-Cola,' and have for years, and did before I went in business on my own account, and when I went into a place and asked for 'dope' I expected 'Coca-Cola.' * * *

When a man calls for 'dope' without expressing anything else, I would think he wanted 'Coca-Cola.' I don't know why, but it has just been customary at soda fountains—at our fountain. No, sir; it was not because 'Coca-Cola' was recognized as having some element of cocaine in it, or some 'dope' in it. I have not heard it called 'koke' as often as 'dope.' I very seldom ever hear it called 'koke' any more. No, sir; 'koke' did not pass out of general use long ago; I hear it occasionally now. The word 'dope' is used frequently, even, possibly, as many times as 'Coca-Cola,' but the word 'koke' is used very infrequently."

GEORGE L. SEIBERT (Rec., 551), soda dispenser for Dave S. Bauer, the druggist in Mobile, testified:

552 "You ask if, from my experience as a soda dispenser, I have formed any opinion as to the meaning of the words 'koke' and 'dope'; well, the only way I can say, it would be more of a nickname for 'Coca-Cola.' When people want that, they think of it quicker and it's more of a nickname for it, too, because anybody coming in there—I have seen it quite often happen—and asking for 'koke' or 'dope,' they go to ask you about Candler in Atlanta, telling you how he got rich off of it, and they call for a 'koke' at the same time and then they will tell you about it; therefore, they mean 'Coca-Cola' when they come in and ask for it. * * * The word 'dope' has no meaning to me except 'Coca-Cola,' that's all. I have never heard it used in any other way at a soda fountain. Yes, sir; it has a meaning. I understand it to mean generally
553 'Coca-Cola.' When you ask me or anybody else for 'dope' you get 'Coca-Cola' down at Bauer's drug store.
554 * * * The words 'koke' and 'dope' are used interchangeably, one as much as the other—both used as a nickname for 'Coca-Cola.' "

R. W. ELLIOTT (Rec., 562), who is in charge of the Van Antwerp drug store soda department, in Mobile, testified that he had known of "Coca-Cola" for fourteen years:

563 "Q. 18. State what the facts may be in respect to the words 'koke' and 'dope' being commonly used as nicknames for 'Coca-Cola.' A. Well, they are commonly used as nicknames for 'Coca-Cola.' I have known these words 'koke' and 'dope' being used as nicknames for 'Coca-Cola' ever since I have been working around soda fountains, about 12 or 13 years. * * * These people who came in to drink 'Coca-Cola' in our place ask for it under different names; they ask for it under 'Coca-Cola'—I have heard them ask for it under 'dope'—I have heard them ask for a 'koke'—I have heard them call for a 'shot in the arm,' meaning 'Coca-Cola,' and I have also heard them call for 'morphine coctails,'—a good many nicknames, all meaning 'Coca-Cola,' they are all satisfied when we give them 'Coca-Cola,' we never hear any
564 complaint. There is no way of getting at the proportion of people who ask for 'Coca-Cola,' using the name 'Coca-Cola,' I don't think. A customer will come in to-day and call for 'Coca-Cola' and to-morrow he will nickname it."

I. V. WOOD (Rec., 566) of the firm of Albright & Wood, druggists of Mobile. Operate two stores. Has known "Coca-Cola" for about twenty years:

566 "I have heard the words 'dope' and 'coke' used as nicknames for 'Coca-Cola.' I have known them to be used as nicknames for 'Coca-Cola' practically as long as
570 I can recollect the name 'Coca-Cola.' I claim 'dope' has two meanings: It is a slang—"the dope on horse races," 'the dope on the baseball game' and different things; but when a man comes to the prescription department, I

would think that he wanted a narcotic if he called for a 'dope.' If he went to a soda fountain I would naturally think he wanted 'Coca-Cola.' * * * I can't exactly recollect that I was shocked that he wanted 'dope' the first time I heard a man call for 'dope,' because it has been a common expression of the word, used for a substitute for the word 'Coca-Cola'—as a nickname—I don't know which you might call it—since I have been big enough to know anything—I have been working in drug
 571 stores since I was ten years old. * * * You ask if you are to assume that the customer who come in never use the word 'Coca-Cola' but always call for either 'dope' or 'koke'; well, you can watch a customer, sometimes he will come in and ask for 'Coca-Cola' and possibly the next day he will call for 'dope' and the next day he will call for 'koke.' I find the average 'Coca-Cola' drinkers are liable to call for it under either one of these three names. I will say that there isn't twenty-five per cent. of our customers that uses the correct name for 'Coca-Cola.' Possibly twenty-five per cent. of my trade use the correct name and about seventy-five per cent. of my trade will call it 'dope' or 'koke.' "

GEORGE S. MORSE (Rec., 645), buyer of the Economy Drug Store in New Orleans, testified:

646 "You ask if people, when they mean 'Coca-Cola,' invariably use the name 'Coca-Cola' or if they have other expressions; oh, sometimes they use other expressions. They usually ask for a 'dope' or 'koke.' When a person comes into our fountain and asks for a 'koke' or a 'dope' we understand that he means 'Coca-Cola,' and we furnish 'Coca-Cola,' in response to such requests."

C. G. PETERS (Rec., 653), druggist in City of New Orleans for twenty-eight years, operated soda fountain in connection with his business for same period, handling "Coca-Cola" for eighteen or twenty years:

- 654 "When people want 'Coca-Cola' most of them ask for 'Coca-Cola.' Some ask for 'koke' and some for 'dope.' * * * You ask how long I have known the names 'dope' and 'koke' to be used as nicknames for 'Coca-Cola'; lately,—I can't tell exactly, might be seven or eight years, might be longer."

PIERRE AUGUST CAPDAU (Rec., 664), a pharmacist, for thirty years in the drug business in New Orleans, familiar with "Coca-Cola," having handled it off and on for maybe twenty or twenty-five years:

- 665 "You ask me to state, when people order 'Coca-Cola' at my fountains, what names they use to indicate that they mean 'Coca-Cola,' and want that; some will say 'give me a 'koke'' and some others will say 'give me a 'dope,' and still others will say 'give me some drug'—they all use a humorous expression, or a slang expression, and it always indicates the one thing—and that is 'Coca-Cola.' "

O. P. BLAND (Rec., 670), has soda water and ice cream business in New Orleans and handles "Coca-Cola":

- 670 "Yes, sir; people coming to my place of business use other names besides 'Coca-Cola' in calling for 'Coca-Cola,' such as 'koke' and 'dope.' I understand those names to apply to 'Coca-Cola.' "

II. W. FLOWERS (Rec., 676), resident of New Orleans, employed as dispenser at the soda fountain of Capdau, druggist, in this line of work for six or seven years:

- 676 "I have heard the names 'dope' and 'coke.' If a man comes to my soda fountain and asks for 'dope' or 'coke' I understand that he wants 'Coca-Cola.' Yes, sir, that is applied to 'Coca-Cola,' generally."

R. W. BROWN (Rec., 681), lives in New Orleans, formerly in Vicksburg, Mississippi; in the soda water business:

- 681 "I have heard the names 'koke' and 'dope' used at our fountain. They apply to 'Coca-Cola,' that's what we generally give them when people use that nickname; they hardly ever call for 'Coca-Cola,' they say 'dope' or 'koke,' somethink like that."

FRED SCHWARTZENBURG (Rec., 680), managing Katz & Besthoff's soda fountain, New Orleans; has been serving "Coca-Cola" for several years:

- 681 "You ask what names are used at our fountain in calling for 'Coca-Cola,' 'dope' and 'koke'—any name that they think we'll understand that they want 'Coca-Cola.' When they use these various names I understand that they want 'Coca-Cola' and that it applies to 'Coca-Cola.' "

ALBERT J. MILLER (Rec., 679) in the confectionary business in New Orleans, serves "Coca-Cola," has been handling it over five years, known it fifteen or eighteen years:

- 680 "We have calls at our fount for a drink under the name of 'Koke.' When a person calls for a drink of 'koke' I understand that they mean 'Coca-Cola' and I serve

'Coca-Cola' when they ask for it. They ask for 'koke,' and 'dope,' too, that's a nickname."

CECIL V. ROGERS (Rec., 735), druggist, Dallas, Texas; has been in drug business about twenty-three or twenty-four years:

- 735 "You ask me to state if I know the expression used by my customers at my soda fountain, which I understand to be a request for the product of the Coca-Cola Company; well, they come in and call for it—I have had them come in and call for a 'dope' or call for a 'coke'—they very often, in fact more often, call for a 'coke'; they will come in and say 'give me a "coke,"' just abbreviate it.
- 736 * * * You ask how long I have known people to ask for 'Coca-Cola' under the name of 'coke'; I think it would be conservative if I said 15 or 16 years, during
- 738 which period they have called for it under the name
- 739 'dope,' but that is not as frequently as 'coke,' though. 'Coke' is the word they use more frequently than any other name I have known it to go under. * * * The first time I ever heard it called 'dope' I asked them 'what do you mean by "give me a dope?"' They had some plumbers and electricians right near my store and one of them said 'give me a dope.' I said, 'What do you mean?' and he said 'Coca-Cola,' but I hadn't heard that under that name."

JACOB SCHRODT (Rec., 740), druggist, Dallas, Texas:

- 740 "You ask if when people at our store come in they invariably use the name 'Coca-Cola,' or if there are other words used to indicate what they want; sometimes they call for a 'dope,' sometimes some of them ask for 'coke,'
- 741 some of them for 'a shot in the arm.' Some of them, very few of them, say 'Coca-Cola.' When a man asks for

'dope' or 'coke' we usually repeat back to him, 'Coca-Cola'? Ever since I have been in the drug business I have gotten in the habit, in fact I try to train all my help, that whenever a customer asks for anything in the store to repeat the name back to them as they understand it and if there is a mistake they catch it before it gets any further, and I do same thing at the soda fountain. If a man says, 'Give me a dope,' I have the boys say, 'Coca-Cola'? When he says, 'Give me a dope' or a 'coke' we tell them we haven't got it because we don't serve anything else but 'Coca-Cola' along that line. No, sir; in response to the question that I have just stated the dispensers ask the customers—those who ask for 'dope' and 'coke,'—I have never had them say that it was not 'Coca-Cola' that was wanted. You ask how long I have known the word 'coke' as a short name for 'Coca-Cola'—oh, for years; I am not certain how many years it has been. The word 'coke' has been used for 'Coca-Cola' to say definitely it would be almost impossible; I have known
743 it eighteen years, at least. * * * No, as a result of my training my custom is not getting out of the habit of using the nickname and getting the regular name—that are just as bad as they have always been and if anything, worse, because they know that we know what they want. My regular customers that drink 'Coca-Cola' all the time say, 'Give me a coke,' where they mean 'Coca-Cola'; well, I know what they want, and they know that I know it, too. * * * Yes, sir; I have had purchasers come into my store and ask for 'dope' that I was not acquainted with and have had my dispensers ask them what they meant. No, sir; they did not say anything other than 'Coca-Cola.' ”

CHARLES R. SMITH (Rec., 746), Dallas, Texas, drug business about fifteen years:

746 "They have different names for it. A fellow will call it 'coke,' 'dope'; some fellows come in and say, 'Give me a shot in the arm.' Well, of course, when they ask for it by those names I would naturally think they wanted 'Coca-Cola' and have always served them 'Coca-Cola.' "

J. W. ARRAANT (Rec., 748), in charge of the Southland Drug Store soda fountain, Dallas, Texas; in the dispensing business a little over eight years:

748 "I am familiar with the names which customers apply to 'Coca-Cola' in asking for it. They call for it under the names of 'coke,' 'dope,' 'shot'—mostly ask for 'coke' when they come up to the fountain. When they do so I ask them what they mean and they say 'Coca-Cola.'

749 * * * Something like a month ago I put on a dispenser's test at the request of a representative of the Coca-Cola Company. That test continued something like a day and a half or two days. About ninety per cent. of the people called for 'coke.' I would ask them, 'What do you mean when you say "coke"?' They would say, 'Coca-Cola.' Not one of them answered that question dif-

750 ferently. * * * Yes, sir; these people I was asking the question of the other day thought I was putting up a joke on them; or they would ask, 'What are you trying to do?' and I said, 'There has been a drink made here in Dallas called "Koke" and they want to know if you want "Koke" or "Coca-Cola." ' They said, 'Hell, no, we want "Coca-Cola." ' ' ' ' "

A. M. TIMMS (Rec., 752), soda man Owl Drug Company, Dallas, for ten or twelve years:

- 752 "We have had people ask for it different ways, some ask for 'coke' you know, some 'Coca-Cola,' some would ask for 'dope,' you know. When a man asks for 'coke' or 'dope' I understand that he means 'Coca-Cola'; I generally ask him, 'Coca-Cola?' and he says, 'Yes.' I have been asking people that question ever since the last couple of weeks. A man asked me to put that test on and I have been doing so ever since. Before that I just gave them 'Coca-Cola.' I have never had 'Coca-Cola' rejected as
- 753 not what was asked for. I have known the name 'coke' to be used as a nickname for 'Coca-Cola' ever since I have been working in the business. In other words, about ten or twelve years, something like that. They asked for 'coke,' 'needle,' and all like that; I didn't pay much attention to it. When a person uses these expressions I ask him and he says 'Coca-Cola' every time. You ask if I understand that 'coke' and 'Coca-Cola' are equivalent and mean the same thing; well, when they ask for 'coke' they always mean 'Coca-Cola,' that's what they mean."

JAMES F. ROGERS (Rec., 754), drug business at the Southland Hotel:

"My observation has been during the fifteen years I have been in business, that 'Coca-Cola' is called for under the names 'coke,' 'dope' and 'shot'—I believe those are the most frequent names—'coke,' however, is the most frequently called for; it is called for by fifty per cent. of our customers now; they call it 'coke' meaning 'Coca-Cola.' "

C. D. KINGSTON (Rec., 790), druggist, Dennison, Texas:

- 790 “The name ‘Coca-Cola’ is not invariably used in full by people who consume ‘Coca-Cola’ at my fountain. Some ask for ‘Coca-Cola,’ some ‘coke,’ some ‘shot in the arm,’ some ‘dope.’ When a man asks for ‘coke’ I understand that he means ‘Coca-Cola’ and ‘Coca-Cola’ is what I supply. I have never had it rejected on the ground that it was not what was asked for. I don’t know how long I have known these words ‘coke,’ ‘dope,’ ‘shot in the
- 791 arm,’ etc., to be used as nicknames. It has been so long I have never paid any attention. It has been pretty near ever since I have been selling ‘Coca-Cola,’—for five or six years—ever since I had a fountain.”

R. L. ASBELL (Rec., 756), soda dispenser for Cecil Rogers, Dallas, drug stores; worked before that at Dimitri Minich; before that at Britton’s drug store; before that at Brown & Allen’s, and Cone’s, Atlanta:

- 756 “At the various places that I have operated, people say, to indicate to me that they mean ‘Coca-Cola,’ they will ask for ‘dope’ and some places they call it ‘coke.’ In Dallas the most common name is ‘coke.’ In response
- 757 to a request for ‘coke’ I furnish ‘Coca-Cola.’ I generally ask the question, does he want ‘Koke’ or ‘Coca-Cola,’ he would smile and say he wanted ‘Coca-Cola.’ * * *
- In Atlanta, my experience was that the name used over there was ‘dope.’ No, sir; I didn’t hear people in Atlanta ask for ‘coke.’ When a person asked for ‘dope’ in Atlanta I understood he meant ‘Coca-Cola’ and furnished ‘Coca-Cola.’ No, sir; I never had it rejected as not what was asked for. Yes, sir; I do regard the names ‘coke’ and ‘dope’ as commonly used nicknames for ‘Coca-Cola.’ ”

DEXTER H. HARDIN (Rec., 759), dispenser in Owl Drug Company, Dallas, Texas:

759 "Our customers call for 'Coca-Cola' under the names 'Coca-Cola,' 'dope,' 'coke,' 'shot.' I first remember hearing them about four years ago. * * * A test was made between two and three weeks ago at the request of Mr. Peace. The result of that test was that about a
760 third of the customers called for it under the name of 'coke.' Whenever they called for 'coke' or 'dope' I asked if they wanted 'Coca-Cola' or 'Koke,' and the reply was 'Coca-Cola.' * * * I think there were about a hundred people come in during that time and about thirty-five of them called for 'coke.' Yes, sir; I asked each of those thirty-five what he meant by 'coke' and his answer was 'Coca-Cola.' "

S. Y. ALTHOFF (Rec., 760), manager of the Owl Drug Store, Dallas, Texas; for thirteen years in the drug business:

761 "I know how purchasers of 'Coca-Cola' indicate that they want 'Coca-Cola.' The name 'Coca-Cola' is not invariably used; it is quite frequently shortened into 'coke' or other words used, such as 'dope' or 'shot.' When a man comes into our store and asks for either 'coke' or 'dope' or 'shot' I understand that he means 'Coca-Cola.' Yes, sir; these terms are familiarly used nicknames for 'Coca-Cola.' In response to requests for 'dope,' 'coke' or 'shot' we give 'Coca-Cola.' We have never had it rejected as not being what was asked for. I have heard the words 'coke' and 'dope' since I have been in Dallas, that is, about six years. During all of that period a request for 'coke' has been understood by me to mean 'Coca-Cola.'

The same applies to the use of the word 'dope.' You

ask if I have ever thought of what the word 'dope' means in regard to that; well, the word 'dope' may mean to some people a narcotic or sedative or drug, but I don't think it has any connection with the drink. I have inquired, in a limited way, of many people whom I know
762 just in a friendly sort of way, when they come and ask for 'dope' or 'coke' I tell them we don't keep that, we keep 'Coca-Cola'—that's merely in jest, but they mean 'Coca-Cola.' I have never gone into their minds to find out how or why they call it 'dope,' but we generally know it is a nickname for 'Coca-Cola.' "

O. M. BROWN (Rec., 763), clerk at the Oriental Drug Store, Dallas, Texas, and in charge of the soda fountain:

764 "In dispensing 'Coca-Cola' it has been called for during the period I have been selling it by those who use it under the names 'coke' and 'dope,' 'shot in the arm' and 'Coca-Cola.' I have been observing the name 'coke' applied to it ever since I began noticing it, say five or six years ago. About three weeks ago at the request of the 'Coca-Cola' representative, Mr. Peace, I put on a test at the Oriental Drug Store, of our customers coming in. Q. 14. Well, now, what proportion of these people that called for 'coke' during the time that test continued wanted 'Coca-Cola'—that called for 'coke'? A. Well, half of them, anyway. Yes, sir; I would ask them what they meant and their answer would be 'Coca-Cola.' "

E. B. THOMAS (Rec., 766), confectionery business, Dallas, Texas; handled Coca-Cola about eight years:

766 "During this period my customers had been calling at the fountain for 'Coca-Cola' under at least somewhere in the neighborhood of a dozen names, I should judge.

They called for 'dope' and called for 'coke' and they called for 'dry-town eye-opener' and they called for a 'shot'—things like that. Yes, sir, they called for 'Coca-Cola,' also. They called for it as 'coke' frequently, as much as they did 'Coca-Cola,' if not more. I couldn't say as to how long they had been calling for it as 'coke,' 767 it seems to me it has been as far back nearly as I can remember—a good little bit, nicknaming it 'koke,'—seems like the same way as going into a saloon and saying, 'Give me a bottle of Bud'; as far back as I can remember they would say, 'Give me a bottle of Bud'—for 'Bud-weiser.' "

F. L. SKILLEN (Rec., 792), druggist, Dallas, Texas:

792 "The people at my fountain indicate that they desire the product of the Coca-Cola Company by calling for 'Coca-Cola' and 'coke.' When a person calls for 'coke' 793 I understand that he means 'Coca-Cola' and 'Coca-Cola' is what I supply in response to such demand. I have never had it rejected as not what was asked for. I would say that about twenty-five per cent. of the people call it 'coke.' I have known 'coke' to be applied as a nickname for 'Coca-Cola' ever since I have been serving it, which 796 was fifteen years. * * * I generally call for 'coke' myself. When I go to my own fountain I say, 'Give me a coke.' "

D. P. ENGLISH (Rec., 801), drug business, Dallas, Texas:

801 "I have been dispensing 'Coca-Cola' at other places in Dallas before beginning at my present place, and have heard customers calling for it frequently during that time. I know under what different names they call for it; some call for 'coke,' some 'dope,' some call it 'shot in the arm,' and various other names. A good many of

them call for it under the name of 'coke.' I couldn't say exactly how long I had been hearing them call for it as 'coke,' but I should say some six or eight years, probably eight or ten years."

E. EWER (Rec., 807), druggist, Dallas, Texas:

- 808 "Yes, sir; I am around the fountains so that I can hear people when they ask for drinks, I wait on the trade forty per cent. of the time. Yes, sir; I deal in 'Coca-Cola.' Yes, sir; it is a drink that is in demand, very much so. I presume I sell more 'Coca-Cola' than any other one drink. Yes, sir; I know how people ask for it. The majority of them call for 'coke.' I understand when they call for 'coke' that they want 'Coca-Cola,' and I always furnish 'Coca-Cola.' No, sir, I have never had it rejected as not what was asked for. You ask what my opinion is as to whether the word 'coke' is a nickname or short name among the public; I presume it is just a nickname for 'Coca-Cola'—not specially a nickname, either, but just to keep from saying the whole thing, just to shorten the word."

D. R. KEYSER (Rec., 809), manager Stovall Drug Store, Dallas, Texas:

- 809 "Yes, sir, the concerns with which I have been engaged have been dispensing 'Coca-Cola' at the soda fountain. Yes, I have observed the different names under which customers call for it; they call for it under the name 'coke,' 'dope' and 'shot in the arm' and I have had a few of them come up there, personal friends of mine, and say, 'Hit me with one,' in a very few instances. * * * Practically all of my customers call for 'Coca-Cola' as 'coke,' and when they do so I serve the 'Coca-Cola.'"

GEORGE C. KERSHAW (Rec., 811), manager of the Dade Drug Company, Dallas, Texas:

- 811 "You ask if people who desire drinks invariably call it 'Coca-Cola,' or if they make their wants known through other means; they seem to have different slang expressions for it,—sometimes call it 'coke' or 'dope.'
 * * * You ask how long I have known 'coke' to be used as a short name for 'Coca-Cola'; practically ever since I have been around the soda-fountain; namely, for
 812 about ten years. * * * Some people call for 'Coca-Cola,' some people express it as 'coke' and still some others use a worse and more slangy expression—they say 'shot in the arm'—'give me a shot in the arm'—all meaning 'Coca-Cola,' or so taken by me and the soda fountains. No, the name 'Coca-Cola' is not dying out—I guess about half of the people still say 'Coca-Cola.' As I say, about half of the people call for 'Coca-Cola' and about half call for 'coke' and 'dope' and slang expressions meaning 'Coca-Cola.' "

TONY GIARRAPUTA (Rec., 814), Dennison, Texas, in confectionery business thirteen or fourteen, maybe fifteen years:

- 814 "My customers call for it under more than one name; sometimes call it 'coke'—'Give me "coke"'—they come say, 'Give me "dope"' ; sometimes, of course, a new customer he say, 'Give me "shot in the arm,"' and, of course, I know of no such names because it look too bad in business. You ask if many or few call for it under the name of 'coke'; well, of course, in small town, you know, I couldn't say no 'coke,' of course, get many strangers, but my own folks, men come say, 'Give me a "coke"'—they use such language, the language I was speaking about,—it's custom, you might say, family custom by us,

it's like family custom you might say, we do business with every hour, you might say, of course, they are joking, but the name is regular, they say, 'Give me "coke,"' and absolutely they mean 'Coca-Cola'; if you was to try to give him something else they won't stand for it; therefore, I have been in business the time I answered a while ago and I never did have an imitation of 'Coca-Cola,' they been people try to sell to me, but I never did the

819 buying. * * * I believe about ten per cent. of my customers call for 'Coca-Cola' and the balance call for 'coke.' Ninety per cent. call for 'shot in the arm,' 'dope' and 'coke.' You ask if the name 'Coca-Cola' is passing out and if I hear it now as often as I used to; well, they abbreviation a little bit. They abbreviate the name of 'Coca-Cola' a little, yes, sir, exactly, and I suppose the abbreviation is taking the place of the name. Yes, sir; I believe that is the case in Dennison where I live."

W. H. RAMSEY (Rec., 820), drug business, Dennison, Texas:

820 "You ask under what different names my customers call for it at the fountain; they call for 'coke,' 'Coca-Cola,' and 'dope.' I suppose fully two-thirds of them, at least, call for 'Coca-Cola' as 'coke.'"

F. W. HAYLEN (Rec., 821), retail grocery business, Pilot Point, Texas:

"The orders now presented to me marked Plaintiff's Exhibit No. 162, which were identified by the witness Lupton, this morning, were written by me. They were addressed to the Coca-Cola Bottling Works and I was making orders for so many cases of 'coke' in each one. By the use of the word 'coke' I intended the Coca-Cola Bottling Company to understand that I wanted five cases

of bottled 'Coca-Cola.' I presume I have been dealing with the Coca-Cola Bottling Company at Dallas and calling it 'coke,' when I wanted 'Coca-Cola,' about eight years; I called it nothing else except 'Coca-Cola.' I would not use the name 'Coca-Cola' very frequently. I usually wrote these matters hurriedly and abbreviated them and made them as short as possible. You ask if I wrote the word 'coke' then as an abbreviation of 'Coca-Cola'; yes, sir."

J. B. SMITH (Rec., 823), in restaurant, confectionery and cold drink business in Tioga and Pilot Point, Texas:

823 "You ask if I knew what he was ordering when he was ordering 'coke'; he was ordering 'Coca-Cola,'—he might have wrote it 'coke,' but he was ordering 'Coca-Cola.'

825 * * * At Pilot Point we are carrying on a soft drink business; we sell milk shakes, 'Coca-Cola,'—signs in the house say 'Coca-Cola Bottling Works; call for it by the right name,' but nearly every one says, 'Give me a "coke,"' and it's branded on the bottles; there is supposed to be about half of them say, 'Give me a bottle of "coke." ' No, sir, they do not call it 'dope,' they just say 'coke.' Nobody out in the country has ever called it 'dope' to me. At Tioga I have had them say, 'Give me a shot in the arm'—they mean 'Coca-Cola,' though, of course."

PETER CAMARINOS (Rec., 827), confectioner at McKinney, Texas:

827 "You ask if I know how people ask for it when they cate to me that they desire the product of the Coca-Cola 'coke,' 'dope,' 'shot in the arm,' 'hop,' sometimes. I understand by requests for any of those things that they want 'Coca-Cola.' "

T. J. BRITTON (Rec., 829), retail drug business, Dallas, Texas:

- 829 "You ask how people who come to my fountain indicate to me that they desire the product of the 'Coca-Cola' Company; well, I should judge that about fifty per cent. of them call it 'Coca-Cola,' the balance of them call it 'coke' and 'dope'—'coke' and 'dope' are the principal names. When a man asks at my fountain for 'coke' or 'dope' I understand that he means 'Coca-Cola' and I always supply 'Coca-Cola' in response to such a request. I have never had it rejected as not what was asked for. I don't know how long 'coke' and 'dope' has been used as designations of 'Coca-Cola'—oh, in the last six or seven years, I judge, maybe longer, I don't know. Yes, sir, I have known the name 'coke' as a nick-
830 name for 'Coca-Cola' about the same length of time."

B. W. FULLER (Rec., 833), in soda water business. Has been with Vienna Ice Cream Factory, Kirby Drug Company and the Palace Drug Store, Dallas, Texas:

- 833 "My customers buying 'Coca-Cola' call for it as 'coke,' 'Coca-Cola,' 'dope' and 'shot.' About nine out of each ten call for it under the name of 'coke.'"

EDWARD T. LANGAN (Rec., 894), 55 East Congress street, Chicago. Has been in drug business; worked for A. W. Adamick, Chicago Avenue and Clark street as drug clerk; connected with Auditorium Pharmacy for a year; has sold "Coca-Cola" for the last twelve years:

- 894 "When people order 'Coca-Cola' they use various names to indicate their desire. Take it as a rule, a
895 stranger coming in that you do not know will ask for 'Coca-Cola,' but a regular customer coming in, they get

in the habit of talking to you and kidding you and they ask for, oh, lots of things, like 'dope,' 'shot in the arm,' and 'coke.' When a man asks at any of the fountains with which I have been connected for 'coke' I understand that he means 'Coca-Cola.' I could not say that I have ever made any inquiries of people asking for 'coke' as to what they mean because I always repeat 'Coca-Cola?' and they always say, 'yes,' and when a man asks for 'dope' or 'shot' or anything like that, I turn around and ask them every time whether they mean 'Coca-Cola' and they say, 'yes.' Ever since I have been in the business, about twelve years, a few would come in and ask for 'coke.' * * * They also use, the expression around
897 Chicago, 'dope,' meaning 'Coca-Cola.' * * * I said
899 on direct examination that frequently when a man would come into my fountain and ask for 'dope' I would say in-
900 quiringly, 'Coca-Cola?' and I have never had anybody in response to that inquiry say that 'Coca-Cola' was not what he meant when he asked for 'dope.' No, sir; I have not any doubt from my experience what a person meant when he came to a soda fountain and asked for a drink under the name of 'dope.' He meant 'Coca-Cola.' "

**ADMISSIONS OF THE KOKE COMPANIES'
WITNESSES.**

It is clear from the admissions made by the witnesses called by the **Koke Companies** that the words **Koke** and **Dope** are generally used nicknames for **Coca-Cola**. The following are quotations from the testimony:

WILLIAM F. DAVIS, of Davis-Fuston Drug Company, Nashville, Tennessee, testified as follows:

1107 "I think 'dope' is a nickname used for the 'Coca-Cola' drink more than any specific name, probably."

JOHN D. FLETCHER, manufacturer of carbonating syrup, Nashville, Tennessee, testified:

1099 "This was part of my answer and I swore to it. 'Defendant avers and says that shortly after the preparation of Coca-Cola syrup and extract was put upon the market by J. S. Pemberton, for brevity's sake, the words 'Coca-Cola syrup and extract were contracted by the users and consumers of it, first, to the words "'Coca-C'ola'" then, to the words "'Coke'" or "'Koke,'" and finally, the product of J. S. Pemberton was styled "'Dope,'" the consumers throughout the country believing the preparation or beverage to contain cocaine, the word "'Dope'" denoting to the layman generally cocaine.' "

This carries the date of the use of these nicknames for Coca-Cola as far back as 1887. Pemberton died in 1888. (Rec., 1590.)

A. W. STANLEY, in the hotel business at Chattanooga, Tenn., testifies:

1005 "If he would say a dope, of course, before Koke or any other drink was introduced, come in, and we only had

Coca-Cola, I would understand he wanted Coca-Cola. Lots of fellows would come in and say, 'Give me a dope.' I would say, 'What kind of dope do you want?' and he would say, 'Give me Coca-Cola, or give me something else.' You know sometimes they call Coca-Cola dope, you know how these fellows are."

BURTON JONES, in drug business at St. Elmo, Tennessee, testified:

- 1006 "I have had calls for dope at my establishment, when a customer asks for dope, he wants a cola drink of some kind. There are so many substitutes on the market, they might want a cola drink. I do not know about that, I would not say positively they would want a cola drink, or want one of the same articles. I would not say what he would want. * * * When customers come to my store and ask for 'a dope,' we serve Coca-Cola. * * *
- 1011 When a man came into our place of business and asked for a Koke or a Dope prior to the three years we handled Tru-Cola, we would give him Coca-Cola to drink, and when we put that Tru-Cola in, when he called for a dope or such as that, we gave him this Tru-Cola. Prior to that time I was new in the business and understood that he wanted Coca-Cola. * * * Up to the time we put in
- 1012 Tru-Cola when people asked for a koke or a dope, they wanted a cola drink. I suppose Coca-Cola. * * * Up
- 1013 to the time we put in Tru-Cola we served Coca-Cola for koke or dope, that is what we understood it to be. * * * At first when handling Coca-Cola, if men asked for a koke or a dope I gave them Coca-Cola and after I put in Tru-Cola and a man asked for Koke or Dope, I gave him Tru-Cola. I changed because there was fifty cents difference in the price of the syrup."

R. K. SMITH, first soda clerk with the United Cigar Store Company at Nashville, Tenn., testified:

1187 "We have people come into our fountain and ask
for Koke and Dope. If it should be a regular customer
that I have been in the habit of serving at all times and
know what he drinks, I give him Coca-Cola if that is what
he drinks, otherwise if he asks for Koke or Dope, I ask
if he wants Coca-Cola. * * * A lot of people call
1188 that meaning Coca-Cola when they say Dope. * * *
I have had people come in and ask for Dope and
then laugh and say give me a Coca-Cola. * * * There
1190 is no doubt there are men who mean Coca-Cola and ask
for it under the name of Dope; use Dope as a nickname
for Coca-Cola, and the word Koke too; they use that for
a nickname for Coca-Cola. That has been so for some-
time in the south. * * * I remember an occasion where
1189 I called in and asked for a Dope, at Harrison, Tenn.,
and getting a drink. That has been seven or eight years
ago that I was out driving with a friend of mine and
asked for a Dope, and got a bottle of dope from a little
country store. I drank it; it tasted very similar to Coca-
Cola. It was labeled Dope. * * * That circumstance
1190 I related at Harrison, Tenn., when I asked for Dope I
expected to get a Coca-Cola. * * * I expected to get
1191 Coca-Cola because I had been there at Chattanooga and
the rest of the boys around, you know, call it Dope, and
had that in my mind when I asked for Dope."

J. G. BOOTH, soda dispenser, in employ of Paul and John Stumb, Nashville, Tenn., testified:

1169 "Customers come into the soda fountain and ask for
a koke or a dope and call for lots of different names, as
Koke, Dope, shot in the arm, shoot me, anything like
that and Coca-Cola. When they ask for these names at

Stumb's I give Coca-Cola, at the other places if they call for Dope there, as well as I can remember I give them something we had in the place of it. Maybe I would always have two pumps if they had anything else like that, and they would tell me if we had calls for Coca-Cola I was to give them Coca-Cola, and if they called for it straight that way, and then if they called for some other name that he would not know for sure whether they wanted the
1170 straight Coca-Cola or some other drink, to shoot one of them to them. That is what they always told me to give. When a customer came into our place of business and asked for a Dope or a Koke I would think he was asking for a Dope or a Koke, there are so many different ones on the market, I would think he was asking for a class of drink instead of some specific drink. If he wanted the original Coca-Cola, if he is that particular about it, he ought to call for it under the real name of Coca-Cola and not a substitute name.

By a substitute name I mean Koke, Dope, shot in the arm."

J. E. DUNN, soda fountain business in employ of Nashville Drug Co., Nashville, Tenn., testified:

1159 "We handled Coca-Cola exclusively. I regard these other cola drinks as imitations used principally as substitutes. At our present store we handle nothing but Coca-Cola and in response to calls for Koke or Dope or a shot in the arm, I serve him with Coca-Cola and understand that is what he means the biggest portion of my time. They use those names as nicknames for genuine Coca-Cola. * * * If a man puts it in his place, and serves it to everybody that comes in, no matter what they call for, it would be a substitute, but if a man puts it in and has Coca-Cola with it, and if a man calls for the sub-

stitute drink give it to him, but unless he calls for the genuine stuff give it to him.

- 1160 If a person asked for a Dope and I gave him this so-called substitute, if he was a stranger to me and I did not have a personal knowledge that he wanted Coca-Cola, I would consider I was giving him what he wanted. You will find the biggest majority of dispensers that are serving two will do that. They give themselves the benefit of the doubt, they don't care so long as they get the drink to him and make more money out of it."

PAUL E. WEBB, soda dispenser. In employ of United Cigar Store Company, Fourth and Union streets, Nashville, Tenn., testified:

"At Smith Brothers in Jackson, when they had only Coca-Cola, I served Coca-Cola when asked for Koke or Dope. * * * Probably at that time I thought he wanted Coca-Cola when he asked for Koke but later on I knew the difference. * * * I was at Henry Sykes in the Stahlman Building and they used two kinds there. They handled Coca-Cola and Dope, they said Dope was anything except Coca-Cola. They made more money on it, and that is the reason why they sold the other for Dope and Koke. When I first started out in the business I understood the names 'Koke' and 'Dope' to be nicknames for Coca-Cola. I understood that they were nicknames of Coca-Cola exclusively, Koke and Dope at first."

GEORGE R. EDMONDSON, a druggist, in Atlanta, Ga., testified:

- 1300 "When asking for a Dope I think they want Coca-Cola. When they ask for Koke I guess they want something, there are so few, I never heard but a few ask for a Koke, and Dope; there are quite a few that call for it. I have

heard those expressions applied to Coca-Cola, that is, Dope, just as far back as I can remember, I guess. Most of them ask for Coca-Cola, or a Cola but a man may come in and say give me a Dope, or a Dope and lime. I have understood always what they meant. * * * The reason
1301 I say that Dope in my opinion means Coca-Cola is that everybody in Atlanta that drinks that want Coca-Cola because there is nothing else sold here except Coca-Cola. You ask a man the second time and he will say Coca-Cola, ninety-nine out of one hundred times, because they do not know anything else."

CHARLES W. BURTON, of Birmingham, testified as follows:

1325 "I have heard people ask for Dope and you would set that out and they would ask for Coca-Cola. The man behind the bar is supposed to give a gentleman just what he asks for. I have heard the public ask for Dope and set it out and they would say: 'I want Coca-Cola.' That is since I have been out of the saloon business for a year and a half, between the intermission of 1908 and 11, I was in the soda-water business in a retail way, before I discovered this, that they would come in and ask for a Dope and they meant Coca-Cola."

A. S. JOSEPH, of Birmingham, testified as follows:

1335 "When a person asked for Dope or Koke, I gave them Coca-Cola."

H. O. ADAMS, of Adamsville, Alabama, testified as follows:

1345 "I never have handled any Coca-Cola. Oh, a long time ago, about twenty years ago I probably handled a few cases. They called that Dope then, yes, sir."

J. L. DRAKE, a soda dispenser for the Nunnally Company,
318 Twentieth street, Birmingham, testified as follows:

1403 "I have always served Coca-Cola when Dope is called for. They have several slang words used for calling for these drinks. Some of them say Dope, some say Koke, some say—I don't know what all they don't say, and these slang words, whenever they used them, wherever I have been I served Coca-Cola."

C. N. BAKER, bottler, Newnan, Georgia:

1407 "There is not but very little difference in all these Cola drinks in taste and color, if any. It takes a mighty close expert to tell the difference. I have a boy who can tell the difference, if there is any, but he does not do nothing but mix and bottle and of course he knows when he gets hold of them. * * * The names the purchasers who want to buy a bottle of this stuff, use in asking for it, some will call for a cola, some for a Dope. I have sold a many a one for Dope. I reckon I have sold a fourth of what I put up for Dope and they got to calling it Dope until the Coca-Cola Company got to advertising it on everything, you know, to call it straight Coca-Cola. On this Dope question, you know, they would fool them in it and they are advertising, you will find it now, I expect, around town here where they advertised to call it by name, straight Coca-Cola. About half the men come in now in our town, and get to where they don't hardly call for anything, they go into the box and ease and look like that, and get what they want and pull the stopper off and drink it. I tell my customers around town they don't need to have a clerk to set it out, but all the men could
1408 wait on themselves, but of course when I don't know that you call for anything, well if you come in and ask for a Dope it don't make any difference what you have, you give it to him, I do, always did."

H. M. TODD, Jackson, Mississippi, in the drug business, testified:

1441 "I have heard of these terms Dope and Koke about six or seven years. They apply to Coca-Cola to some extent. They impressed the customers who generally come in and called for Coca-Cola, so much, just like anything else, a nickname, Koke and Dope. I first heard these terms Koke and Dope just after Coca-Cola came out and when people come in and asked for Koke or Dope, as nicknames for Coca-Cola."

ROBERT E. OUSLEY, of Kosciusko, Mississippi, in the drug business, testified as follows:

1449 "I would have thought that Koke or Dope had applied to any Cola drink. I do not know what it meant before I knew of these drinks, that has been so long ago. I expect most of us would naturally infer that they were nicknames for Coca-Cola, of course, I never gave it that kind of thought."

HUGH LEE BOYD, of Kosciusko, Mississippi, engaged in the drug business, testified as follows:

1450 "I am dispensing the Southern Koke Company's Koke or Dope, and Coca-Cola. Customers indicate to me that they want a Cola drink by asking for a Koke, Dope, give me a shot and thinks like that. When customers come in and ask for a Koke, Dope or a shot in the arm, or shot, I do not understand or consider that they are making a definite and specific request on me for Coca-Cola and
1451 nothing else, because some of my customers know what I handle. I do not know how they know I am handling
1455 Dope. * * * When I asked for Koke and Dope I expected to receive a Cola drink. I might have expected to receive a Coca-Cola. I did not know the difference."

H. F. CRISLER, of Jackson, Mississippi, in the drug business, testified as follows:

- 1427 "I have heard the word Dope used quite a long while,
almost ever since I have known Coca-Cola, for that mat-
1435 ter. * * * Coca-Cola is supposed to be made in At-
lanta, Georgia. I mean the one that is advertised, ask
for genuine Coca-Cola if you want it. 'As for the gen-
uine if you want it, nicknames encourage substitution.'
1436 I have seen that advertisement. It naturally wants you
to demand Coca-Cola irrespective of what you might
want. I suppose they are referring to any Cola product.
I judge that they have reference to Dope and Koke."

T. D. CULBERTSON, Dallas, Texas, the Texas Drug Com-
pany:

- 1703 "Mr. Candler did not have any particular objections to
Koke except that it was being sold at the fountains as a
competitor, is all that I know. He regarded it as
a substitute, a familiar nickname for Coca-Cola, and on
the ground that he objected.

Q. And it is a matter of common knowledge, isn't it
in this section of the country that it is a common nick-
name for Coca-Cola?

(Objected to.)

A. Yes, sir."

THE TRADE WITNESSES CALLED BY THE KOKE COMPANIES.

In order to meet the contention of The Coca-Cola Company that Koke and Dope have been and are nicknames, abbreviations and synonyms for Coca-Cola, the Koke Companies called in their behalf a number of witnesses. These witnesses may be classified as follows:

(a) Saloonkeepers	22
(b) Grocerymen and restaurant keepers	3
(c) Druggists	21
(d) Prescription clerk at drug stores	2
(e) Manufacturers of imitations of Coca-Cola	3
(f) Dispensers at soda fountains	11
(g) Retired manufacturers	2
(h) Bottlers of imitations of Coca-Cola	3
(i) Consumers	3
(j) Wholesalers	1
(k) Not classified	2

Under classification (a), saloonkeepers, are those connected with the saloon trade.

We find testimony to the effect that the terms Koke and Dope mean any drink similar to Coca-Cola. We further find under this classification, that Coca-Cola was the first drink of this kind and character that was known to this class of dealers, and that when Coca-Cola was handled by them, before other similar drinks came on the market, that Coca-Cola was given in response to orders for Koke and Dope.

We find that as soon as other drinks imitating Coca-Cola came on the market, that this class of dealer put in the imitation, and in most instances, kept Coca-Cola on hand as well.

We further find from this testimony that every other similar commodity on the market is sold to the dealer at a cheaper price than is Coca-Cola. We further find in this trade that it is the bottled product that is sold over

the bar, and that when a person orders a drink, the cap or crown is taken off of the bottle, and as has been shown, all the other drinks are similar in appearance and taste to Coca-Cola. Such is the testimony for example of:

Name of Witness.	Record Page.
J. M. Wheeler	970, 971, 972, 973
E. W. Freeman	975, 977
E. W. Ensinger	984, 985
Joe Quinn	992, 994, 995, 996
R. L. Wayman	1014, 1015, 1016, 1017, 1018
A. S. Joseph	1332
C. G. DeSouchet	1349

We find others who say that they understand the meaning of the terms Dope and Koke in this class of traders to mean any soft drink, no matter whether it be similar to Coca-Cola or not:

Name of Witness.	Record Page.
Tom Collins	989, 990, 991

While on the other hand:

Luke Pogue	1060, 1061
J. C. McDonald	1068, 1069
R. W. Lochrie	1339
W. H. Brandes	1383

testify that the terms Dope and Koke mean any drink resembling Coca-Cola, i. e., they testify that they give any such drink in response to orders for Dope and Koke.

M. J. Costello, Record pages 999, 1000, 1001, 1002, 1003, testified that he understands Koke and Dope as nicknames for drinks similar to Coca-Cola, but he is confused in his testimony. That is to say, he confuses the term Koke with Coca-Cola, for on page 1003 of his testimony he says that bottled Koke costs 70c a case, while on the same page he refers to Coca-Cola as costing 70c a case.

A. W. STANLEY uses Koke as an abbreviation for Coca-Cola. On Record page 1003, we find:

“We handled Maud Muller, Sinalco and used to handle Coca-Cola until we got to handling Koke. Henry Boerger

used to put up a drink I used to handle. They claimed it would take the place of Koke—Coca-Cola, I have forgotten the name of it.”

Again, on page 1004, the same witness testifies:

“I have noticed Coca-Cola barrels sitting out in front of drug stores around town. I used to buy Koke by the barrel, Coca-Cola, I mean.”

And, again, see his testimony, page 1005.

W. F. Strickland testifies on page 1048 that in response to orders for Dope, he gives the first thing he can get hold of in a soft drink box.

On page 1049 he testifies that Koke costs 70c for two dozen bottles and Coca-Cola 70c for two dozen bottles, while on page 1050, he corrects his testimony in regard to Koke and says it was 60c, showing that he was confused in his former testimony between Koke and Coca-Cola and used the word Koke meaning Coca-Cola.

Mat Wilson, on page 1211, gives his reason for his belief that Dope and Koke mean anything, when he tells of his hatred for The Coca-Cola Company, that is, the rumor that The Coca-Cola Company had contributed \$10,000 to the prohibition cause.

C. W. Burton (Rec., 1325) shows that he does not know what the public meant when they asked for “Dope.” Sometimes when people would ask for Dope, he would set out the Koke Companies’ product and then they would say “Coca-Cola.”

It will be noted from the foregoing class of testimony that the majority of the witnesses admit that Koke and Dope mean to them almost anything. They do not know what the public want when they ask for Koke and Dope, or what the public mean. A majority of them confessed that Koke and Dope meant Coca-Cola until cheaper drinks came on the market, establishing thereby that Koke and Dope are generic terms to them for profit only. None of

them pretend to know what the public want, or what the public mean when Koke and Dope are asked for.

The rebuttal testimony of The Coca-Cola Company refers to these trade witnesses. It was impossible to find out or ascertain anything concerning the Class (a) trade witnesses at Chattanooga, because on account of prohibition legislation they closed their places of business before the taking of their testimony.

W. J. Finmin, whose testimony on page 1563 shows the reason he stopped Coca-Cola is on account of the fact that it was higher in price, and on 1563 he used the word Koke and Coca-Cola synonymously.

We now come to Class (b) wholesalers and restaurant keepers:

F. E. Hooper (Rec., 998) testifies that Koke and Dope means anything. He shows what he thought of Koke by his testimony on page 998 of the record, and he says on page 999 of the record: "Coca-Cola is the oldest Dope or Koke I remember."

J. C. Price (Rec., 1205, 1206, 1209) testifies that he had Coca-Cola and another similar drink, and when people came in and asked for Koke, he sold the competing drink, because he felt the customers did not want the genuine, and that in his opinion Koke and Dope mean any drink containing caffeine, and that if he asked for Koke and Dope at a soda fountain, he expected to get a competing drink, if the soda fountain did not handle the genuine, and he says the reasons he gave the competing drink was when he didn't have the genuine was because he could make more money out of it.

H. O. ADAMS, page 1345 of the record, testifies:

"I never have handled any Coca-Cola. Oh, a long time ago, about twenty years ago, I probably handled a few cases. They called that Dope, then, yes, sir."

Class (c) druggists is important because all drug stores have soda fountains:

C. P. Embrey (Rec., 1019, 1020, 1021, 2022, 1023, 1024, 1025, 1026, 1027) is typical of this class. He testified on page 1020:

“When customers call for dope we give them the one we make the most money on.”

And he testifies on page 1022, that at one time he served Coca-Cola exclusively when Dope or Koke were called for, and on page 1023 he shows why he changed to selling another similar product, because he made more profit. And on page 1026 he says:

“I never gave him Coca-Cola because I thought it was more profitable. I quit selling Coca-Cola in response to calls for Dope when these other drinks came out which were cheaper.”

This is typical of most of the druggists that testified in this case for the Koke Companies.

They say now that Dope and Koke do not mean any specific drink, but mean a class of drinks, while their history shows that Coca-Cola was the first drink of this kind they knew. The words Dope and Koke were used at the fountain in asking for drinks. They then served Coca-Cola in response to such requests. The next stage Cheaper drinks, that looked and tasted like Coca-Cola, came on the market. Then of course, they made more profit, found an excuse in these nicknames and served the cheaper drink. The third stage was reached when they actually substituted when Coca-Cola was called for.

C. P. Embrey signed an agreement admitting his substitution. The rebuttal testimony shows that he was and has been a confirmed substituter.

See rebuttal testimony, pages 2244-2245, 2267, and rebuttal exhibits 117, 131, 132 and 133.

Burton Jones (Rec., 1006, 1009-1013) is also typical.

He was asked what did he understand when a person asked for Dope. He says (Rec., 1006):

"I have had calls for dope at my establishment, when a customer asks for dope, he wants a cola drink of some kind. There are so many substitutes on the market, they might want a cola drink. I do not know about that, I would not say positively they would want a cola drink, or want one of the same articles. I would not say what he would want."

And again he shows about these substitutes, and his understanding of the meaning on pages 1009, 1010. He shows the stages that he had gone through concerning the change of meaning and the reasons for it as does Embrey, pp. 1011-1013: that before the cheaper product came on the market he understood Dope and Koke meant Coca-Cola, and he goes one step further, in which he states that although the proprietor made the change, the public knew nothing of it, p. 1012, and he confesses on page 1009, that he could not tell what the public want when they ask for Koke and Dope, and on page 1011, that up to the time the cheaper product came upon the market, that he understood the terms Koke and Dope to mean Coca-Cola, and the climax is reached on page 1013, where he states that there is 50c difference in the price of the syrups.

Burton Jones signed an agreement admitting substituting. The rebuttal testimony shows that he was and has been a substituter of drinks.

See rebuttal testimony, page 2076, and Rebuttal Exhibit 116.

Max Bloomstein testifies (Rec., 1145, 1146) that Koke and Dope, used as nicknames, designate a class of drinks rather than a specific drink, but on page 1147, he testifies that the terms were applied to Coca-Cola, as it was the first of these drinks, and he shows why he put in the drinks of the Koke Companies on page 1148, and on page

1148, 1149, he shows conclusively in his attempt to find out what consumers meant when they used these terms, and from that testimony on pages 1148, 1149, it is evident that they meant and wanted Coca-Cola, and the climax is reached when this witness on page 1150, when he states that he handled Coca-Cola alone, and on calls for Koke and Dope he gave Coca-Cola. He changed when he put in Star Cola. His reason for the change. It was considerably cheaper.

It is useless to discuss the testimony of J. B. Freed (Rec., 1171 *et seq.*) of Freed & Haas, for by his own testimony he is a confessed substituter, and if he does not prove it by his own admissions, the rebuttal testimony shows it conclusively.

See rebuttal testimony pages 2238-2240, 1994, 2142, 2179, 2186, 2267, and rebuttal exhibits 127, 128, 134 and 135.

J. M. Smith testifies (Rec., 1182, 1183 and 1184) on calls for Koke and Dope he gives Star Cola or Gerst's Cola, and that he understands by the terms Dope and Koke, any kind of drink similar to Coca-Cola, and that Koke and Dope are not specific names for some specific brand of drink, and on page 1186, he shows why he serves the other drinks in response to calls for Koke and Dope. Of course, they cost less than Coca-Cola, and he testifies that the only drink of this kind that is known to the public is Coca-Cola. On page 1185, he testifies that he does not know what they mean or expect to get when asking for Koke or Dope.

T. H. Lever testifies (Rec., 1228-1230, 1237-1239) that customers that know he handles the Koke Companies' product under the name of Dope are acquainted with that special preparation, and they expect to get that when they ask for Dope, and he considers Dope a nickname for just any drink that a customer is acquainted with

and might apply to chocolate, or chocolate milk, or hot chocolate, and it applies mostly to a cola drink, but not necessarily to a special kind. He says further that he is not around the soda fountain a great deal. He shows his reasons on page 1237 of the record when he does not remember the name of the drink he sold in response to orders for Dope. All he remembers is that it was cheaper. A drink without a name. He says that at one time he handled Coca-Cola and that in response to orders for Dope he gave Coca-Cola. Then the cheaper drink came on the market, and then the change of his understanding of the meaning of the term Dope. See, also, p. 1237. And this question of price again arose when he commenced handling the product of the Koke Companies. (Rec., 1240, 1241.) On page 1244, he shows that this was a good way to get rid of the cheaper product, that is, by giving the cheaper product in response to calls for Dope and Koke.

See rebuttal testimony pages 2178, 2194, 2195, 2152.

E. A. Sharp testified (Rec., 1250, 1253, 1254) that Dope and Koke do not mean Coca-Cola exclusively, but he says on page 1253, in response to a question: "In my estimation Dope and Koke were always similar to Coca-Cola, because I remember, it seems to me it has been about 10 or 12 years ago, they used to have a dope on the market just about the same as Coca-Cola."

On 1253, he testifies that he gave any drink except Coca-Cola, when Dope or Koke was called for, and all these drinks looked and tasted like Coca-Cola, and the climax is again reached:

"Did not cost as much as Coca-Cola." It cost him less and he gave the cheaper drinks, and that is the reason why Dope and Koke do not mean Coca-Cola. (Rec., 1253.) On page 1254, he shows that he does not understand nor wish to know what the public want when they ask for

Dope and Koke by testifying that he knows what they get, and all he knew was that he gave a drink that looked like and tasted like Coca-Cola, and was cheaper than Coca-Cola. This man is a confessed substituter.

See rebuttal testimony pages 2236-2238, 2218, and rebuttal exhibits 122 and 123.

George R. Edmonson, page 1300, testifies right out that he understands when people ask for Dope they want Coca-Cola.

R. A. Thorn, page 1423, testifies that he is handling Coca-Cola, and that while he was handling Coca-Cola, and before he handled the cheaper product, when Dope and Koke were asked for he gave Coca-Cola, and he thought the public meant Coca-Cola.

See rebuttal testimony 2226.

H. F. Crisler (Rec., 1426, 1427, 1430) testified that people indicate by asking for Coca-Cola, that they want the genuine Coca-Cola, and if they want some other drink they ask for Koke or Dope, and that he serves in response to orders for Koke and Dope either Ko-Nut or New Orleans Dope. On page 1427, he testifies that before he went into the soda water business he heard the term Dope, heard Dope used quite a long while, "almost ever since I have known Coca-Cola, for that matter."

On page 1430, he says that the reason he knows that Dope does not apply to Coca-Cola is because when his place of business has been out of Dope (the Koke Companies' product) they had to use Coca-Cola exclusively, and people were not satisfied. It must be noted here, that all of the witnesses testify that all of these drinks are similar in taste and color to Coca-Cola.

H. M. Todd (Rec., 1438) testifies that when people ask for Dope or Koke he gives them Dope (the Koke Companies' product). "All we have got," and that is the product made in New Orleans, and before that product

was made, in response to orders for Koke and Dope he gave them Ko-Nut. He becomes confused, as shown by his testimony on page 1441, as follows:

“I have heard of these terms Dope and Koke about six or seven years. They apply to Coca-Cola to some extent. They impressed the customers who generally come in and called for Coca-Cola, so much, just like anything else, a nickname, Koke and Dope. I first heard these terms Koke and Dope just after Coca-Cola came out and when people come in and asked for Koke or Dope, as nicknames for Coca-Cola.”

See rebuttal testimony 2227.

R. E. Ousley (Rec., 1447, 1448) gives his reasons why he first bought the product of the Southern Koke Company, was because serving anything else in response to orders for Dope or Koke, would be an infringement on their names. He also says that it cost a little less than Coca-Cola, and there was more profit in it. He testifies on page 1449 as follows:

“I expect most of us would naturally infer that they were nicknames for Coca-Cola, of course, I never gave it that kind of thought.”

See rebuttal testimony 2227.

H. L. Boyd (Rec., 1450, 1451, 1453) testified that when customers indicate they want a cola drink, “they use the terms, Koke, Dope and things like that,” that he does not consider them definite and specific requests for Coca-Cola, because some of his customers know what he handles, and the only way that people can know what he handles are those that he speaks to. He does not think that Koke and Dope ever meant Coca-Cola exclusively, but he says that he heard of the specific drinks, Koke and Dope only for the last two or three years.

See rebuttal testimony 2228.

J. G. Pyle (Rec., 1720, 1721, 1725, 1726, 1727, 1728)

thinks that Dope and Koke are not nicknames for Coca-Cola, but he is hardly on the stand before he is using Koke and Coca-Cola synonymously. See p. 1721, where he speaks of Mr. Boyd, who is with the Koke Company of Texas as a representative of The Coca-Cola Company, and his attention had to be called to the fact that he was making a mistake. He testified that he first heard the term Koke in 1904, at Albany, Texas. When he asked for Coca-Cola, the dispenser replied that he did not have it but had Koke, which the dispenser said was something similar to Coca-Cola. He confesses that when he was in the soda water business that Koke might have meant Coca-Cola, and that a lot of people mean Coca-Cola when they call for Koke. That Koke is just shortening the name Coca-Cola, and that he handled at his store now only Coca-Cola, and that he gives Coca-Cola in response to calls for Koke. When a man calls for Koke now he does not know whether he means Coca-Cola or the product Koke and before the Koke Company of Texas started in business at Dallas, it is not improbable that they did call Coca-Cola Koke at that time.

See rebuttal testimony 2189.

C. J. Thornton (Rec., 1759, 1780, 1781). It is well to note that a permanent injunction was taken against the Corner Drug Company, of which C. J. Thornton is the proprietor and manager, restraining the substitution of other drinks on calls for Coca-Cola. Of course, it is but natural that a substituter would say that Koke and Dope mean a class of drinks. This is their subterfuge.

See rebuttal testimony 2189, 2190 and Exhibit 45.

A. S. Goody (Rec., 1787) testifies that Dope at soda fountains means anything like Coca-Cola such as Ko-Nut, Afri Cola, Gay Ola. He testifies on page 1790, that when Koke and Dope are called for at his fountain, he gives Coca-Cola, and when asked whether he understood if they

wanted Coca-Cola, he said: "I did not understand it. I did not pay particular attention to it. I just knew they wanted something." Then comes the climax to his testimony that these other drinks, particularly the drink of the Koke Companies, costs less than Coca-Cola. (p. 1791.) He repeats this on page 1792. He confesses that he might get mixed up when Koke is called for and give either Koke or Coca-Cola. On page 1793, he testifies that he does not know what people want when they ask for Dope or Koke, and that he serves the product of the Koke Companies because it is cheaper than Coca-Cola.

J. E. Jones (Rec., 1796) testifies that when the terms Dope or Koke are used, he served Ko-Nut when he handled it. He further testifies on page 1799 that after consulting with his counsel, that Dope and Koke meant Coca-Cola, and that when he sold Ko-Nut in response to calls for Dope and Koke, he understood that it amounted to substitution. He testifies that he handled Coca-Cola at one time exclusively, and that when he handled it exclusively he served Coca-Cola in response to calls for Koke and Dope. (p. 1800.) Then comes the climax to his testimony, and why he changed: because Ko-Nut was cheaper. (p. 1801.) And to the same effect and as to why this change in his method, see page 1801, to wit: more profit. This man confessed his substitution in writing.

See rebuttal testimony 2190 and Exhibit 115.

E. J. Williams (Rec., 1808, 1809, 1812, 1814). This is the same person against whom the court granted a temporary injunction (the Owl Drug Store, E. J. Williams, owner and proprietor), restraining fraudulent substitution of other drinks on calls for Coca-Cola.

See rebuttal testimony 2246-2251 and Exhibit 49.

W. A. Hickman (Rec., 1821) testifies that when Dope or Koke are asked for he just gives them something cold,

and asked did it mean any particular brand or drink, he says: "I do not know. I do not guess it means any particular brand. You take a lot of people, they call most any kind of a drink Dope. Do not know one drink from the other, but want soda water and call it Dope." His reasons for this is that he had asked several people what they wanted when they asked for Koke and Dope, and they replied:

"I do not know."

On page 1824, he testifies that he does not know what a person wants when he calls for Dope or Koke.

Then the climax is reached: products that look like Coca-Cola and taste like Coca-Cola are cheaper.

H. O. Null (Rec., 1062-1064, 1065).

See rebuttal testimony 2166, 2167.

W. F. Davis (Rec., 1101, 1105, 1107, 1108) is a self-confessed substituter.

See rebuttal testimony 2142, 2159, 2180, 2187.

Sumner Fuston, Davis' partner (Rec., 1110, 1112, 1115, 1116), is also a self-confessed substituter. (Record, same as Davis.)

A resume of the testimony under class (c) proves conclusively:

(1) Koke and Dope meant Coca-Cola.

(2) Until products that looked like Coca-Cola and tasted like Coca-Cola came on the market and were cheaper than Coca-Cola.

(3) And then in response to orders for Koke and Dope, these cheaper products were served without any notice to the purchaser. Therefore, the change in meaning was only so far as the dealer was concerned; and

(4) The public knew nothing of the change; and then

(5) Came the substitution of these cheaper products, even when Coca-Cola was called for by its full name.

There are only two witnesses under class (d), C. H.

Jouett (Rec., 1051, 1052), and F. M. Bogart (Rec., 1070, 1071).

Their testimony shows:

That when Dope is called for, it is left to the dispenser as to what kind of a drink is given, although they do not know or care what the public want.

See rebuttal testimony 2243-2245, 2180, 2164, and Exhibits 129, 133.

Class (e). Three manufacturers of drinks similar to Coca-Cola testified in this case:

Adam Diehl, 1082, 1083.

John D. Fletcher, 1089, 1095; and

Lee Hagan, 1291, 1298.

Adam Diehl testifies that his drink, Star Cola, is a well advertised drink, but outside of the City of Nashville, where it is made, he could not name a place where it had been advertised. The rebuttal testimony shows that Star Cola is substituted for Coca-Cola; that it is similar in appearance and taste, and another witness testified, as has been shown, that Star Cola is a substitute for Coca-Cola. Not a piece of advertising is mentioned of Star Cola, except by Diehl, its manufacturer. If ever there was a case of contributory infringement, it is the case of Adam Diehl's drink. Adam Diehl testifies, of course, that Koke and Dope do not mean any specific drink. The reason for his testimony is plain. He could never sell his product except for these nicknames.

John D. Fletcher was the owner of the Nashville Syrup Company at the time the Coca-Cola Company obtained an injunction against that company for using the name Coca-Cola, holding that it was an infringement, and that Coca-Cola was a valid trade-mark. *Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 153, 157; 215 Fed., 527. He testified in the Nashville Syrup Company case that Koke and Dope were names for Coca-Cola. He now testifies that

Koke and Dope mean any similar drink. Fletcher is now manufacturing a drink under an infringing name.

The testimony of Lee Hagan shows conclusively that his products Ko-Nut and Afri Cola were not known, never called for under their own names, both non-advertised, public knows nothing of them, cheaper than Coca-Cola, and that Coca-Cola is, as he expresses it, the father of all these Koke and Dope drinks, and that the advertising of The Coca-Cola Company makes the sale of all of these drinks possible. Koke and Dope is his means of selling his drink.

Very significant is the conversation that took place between this witness and J. C. Mayfield, when immunity from prosecution by the Koke Companies if their claim to the exclusive right to Koke and Dope were sustained, was promised in the event he testified. (Record pages 1297, 1298.

Class (f) comprises dispensers at soda fountains, young men who have just gone into the business. The rebuttal testimony shows that most of them worked at places where products similar to Coca-Cola in taste and appearance was substituted when Coca-Cola was called for. Most of them testify that they do not know what the public means by the word Koke and Dope, but that they follow the instructions of their employers and serve other drinks than Coca-Cola when Kope and Dope are called for, because they are more profitable. The testimony of this class shows conclusively that the reason they do this is that the other drinks are similar to Coca-Cola in appearance and taste that the purchaser cannot tell them from Coca-Cola and that they are cheaper. Some of these witnesses testify that Koke and Dope are nick-names for Coca-Cola. This class is practically the same as class (c).

And these parties in most instances were in the employ of the Class (c) parties.

Name of Witness.	Record Page.
Paul E. Webb,	1119, 1120, 1121, 1122
Brants Darden,	1123, 1124, 1125, 1126, 1127
J. R. Pardue,	1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143
P. E. Johnson,	1151, 1152, 1153, 1156, 1157
J. E. Dunn,	1158, 1159, 1160
W. W. Randolph,	1160, 1161
J. G. Booth,	1169, 1170, 1171
R. K. Smith,	1187, 1188, 1189, 1190, 1191
F. H. Willis,	1191
J. L. Drake,	1402, 1403
E. J. Ople,	1404, 1405, 1406

Of class (g), Retired Manufacturers, there are only two, W. M. Sidebottom (Rec., 1163) and his partner, F. C. Dorider (Rec., 1195, 1196, 1197).

Mr. Sidebottom testified that when Koke or Dope is called for, what is given depends on the humor of the dispenser, but in his own opinion a request for Koke or Dope is not a definite and specific request for Coca-Cola, but a similar drink, and that when he was in business he would give Celery Cola. (Celery Cola is cheaper than Coca-Cola.) That when he was in business, in response to orders for Dope or Koke he served Celery Cola, Coca-Cola and Cola Ade. Mr. Dorider testifies that when people call for Koke or Dope, that if the customer is a Coca-Cola drinker, he would give Coca-Cola, a Celery Cola drinker, Celery Cola, a Cola Ade drinker, Cola Ade, and that he did not consider Koke and Dope meant Coca-Cola unless the customer was a Coca-Cola drinker, and that the terms Koke and Dope apply to anything with Cola as part of the name.

Under class (h), Bottlers of Product Similar to Coca-Cola, there are three who testified:

W. M. Pollock (Rec., 1201, 1202) testified that he had heard the terms Koke and Dope since he remembered a

cola drink and that they mean a cola drink, and that when he uses the terms Koke and Dope, he does not care what one of the Cola drinks he gets. It must be remembered that W. M. Pollock bottles the infringer John D. Fletcher's "Carbonated syrups, a genuine Coca and Cola flavor."

C. N. Baker (Rec., 1407). To appreciate the entire force and effect of the testimony of this witness, would take a careful reading of his entire deposition. Of course, he has never bottled Coca-Cola. He has bottled only imitations and substitutes. He admits that Dope and Koke are nicknames only for the purpose of substitution, for he says on page 1407:

"I reckon I have sold one-fourth of what I put up for Dope, and they got to calling it Dope until The Coca-Cola Company got to advertising it on everything to call it straight Coca-Cola."

Patrick J. Gillian (Rec., 1503) at one time bottled the product of the Southern Koke Company, Ltd., and while he does not say it in so many words, the intimation is by his obtaining a guarantee against loss if he were sued by the Coca-Cola Company concerning his use of Koke, that he considered it a Coca-Cola nickname and wanted to be protected. On page 1504 of the record, he testifies that both Koke and Dope apply to Coca-Cola, also used in place of Coca-Cola.

Class (i). It is significant in this record that the Koke Companies offer no testimony from consumers as to what they mean by Koke and Dope. Three persons were placed on the stand.

W. F. Boylin (Rec., 1072, 1074, 1075) testifies that Koke and Dope are nicknames for cola drinks. He testified that Coca-Cola was on the market 18 years ago, and that possibly he heard the terms Koke and Dope at that time. (Rec., 1074.) He testifies that Koke and Dope may apply

to Coca-Cola, but that when he wants Coca-Cola he calls for it under the name Coca-Cola. Boylin makes the Koke Companies' labels and formerly made Mayfield's.

E. D. Montgomery (Rec., 1356) is an ex-employee of J. C. Mayfield. He testifies positively that when he asks for Koke and Dope, he means any kind of cola drink.

Alphonse Goldsmith (Rec., 1485) is in the advertising business, selling to The Southern Koke Company, Ltd., and he testifies that he had never used the term Koke or Dope before the Southern Koke Company went into the business.

Class (j). There is only one witness under this head, T. D. Culbreath (Rec., 1703), and he admits that it is a matter of common knowledge in the section of the country where he lives (Texas) that Koke is a common and familiar nickname of Coca-Cola.

Class (k). Under this head we have the testimony of J. W. Mayfield, a son of J. C. Mayfield, and W. McCarthy Moore, once an officer of the Southern Koke Company, Ltd., and an incorporator and promoter of several of the others.

J. W. Mayfield (Rec., 1523-1525) testifies that he went out and asked for Koke and Dope, and in response thereto many and several kinds of beverages were served to him. Coca-Cola was not among these, however. This was on his direct testimony.

On his cross-examination it is shown that he got Coca-Cola in response to the requests for Dope and Koke, but he did not produce the Coca-Cola bottles, saying that that was not the kind of evidence that he was after. (Rec., 1549.)

W. McCarthy Moore testified that he had heard of Koke (on p. 1752, 1753) before he organized the Southern Koke Company, and (on p. 1756) that the use of the word Koke causes confusion in the trade.

A very telling part of this record is the admission of all of the Koke Companies' witnesses who attempted to testify concerning the asserted descriptiveness and generic character of the words Koke and Dope, that all the drinks named in this case, including the Koke Companies' product, are cheaper in price than Coca-Cola, while resembling it in taste and appearance.

Name of Witness.	Record Page.
M. J. Costello	1001-1003
Burton Jones	1012
R. L. Wayman	1014, 1016
C. P. Embrey	1019, 1022
W. F. Strickland	1048, 1050
Wm. F. Davis	1102, 1107
Brants Darden	1124, 1127
J. G. Booth	1170
J. M. Smith	1186
F. H. Willis	1191
T. H. Lever	1228, 1241
E. A. Sharp	1256
G. G. DeSouchet	1350
Champ Yeargin	1352
Dr. R. A. Thorn	1422, 1423
Robt. E. Ousley	1448
S. T. Mayfield	1474
W. J. Finnin	1563
Dr. J. G. Pyle	1725, 1727
O. T. Maxwell	1736, 1737
C. J. Thornton	1760, 1773
A. S. Goody	1791
J. E. Jones	1800, 1801
E. J. Williams	1814
W. A. Hickman	1824, 1825
J. C. Mayfield, Sr.	1687

A fair resume of the Koke Companies' testimony concerning Koke and Dope shows:

1. That Coca-Cola was the first drink of this kind on the market.

2. Other drinks imitating Coca-Cola in taste and appearance, later came on the market that were cheaper

to the handler while selling to the public at the same price.

3. That at first Koke and Dope meant Coca-Cola exclusively.

4. When the cheaper drinks came on the market, in order to make more profit, the handlers used the Coca-Cola nicknames Koke and Dope as a pretext for getting rid of the cheaper drinks.

5. These cheaper drinks are similar to Coca-Cola in taste and appearance.

6. The public never knew of the change made by the handlers.

7. That the testimony shows that these handlers, wholesalers, retailers, and dispensers, only imagined what the public meant by Koke and Dope, and that imagination was due to more profits.

8. That truly Koke and Dope meant and do now mean, and have always meant, Coca-Cola to the public.

9. That the contention of the Koke Companies is not sustained, that Koke and Dope mean their product. But the contention of The Coca-Cola Company is sustained that Koke and Dope are nicknames, or synonyms, short names or abbreviations for Coca-Cola.

The testimony of the Koke Companies' trade witnesses, the rebuttal testimony of The Coca-Cola Company, and the exhibits, show that at least ninety per cent. of the Koke Companies' trade witnesses are those against whom have been proven cases of fraudulent substitution, some of whom had admitted such practice, against others injunctions have been obtained and others the proof shows beyond doubt that they were guilty of such practice. The Koke Companies could find no other kind of witness by which they could attempt to prove their defense and could only bring before the court those that had been at some prior time proved guilty of trespassing on the rights of The Coca-Cola Company.

TABULATION OF EVIDENCE ON NICKNAMES KOKE AND DOPE.

The following is a tabulation of the testimony of trade and other witnesses to the fact that the words **Koke** and **Dope** are used as abbreviations or short names for **Coca-Cola**, and where the witnesses state the length of time during which this has been the fact it appears in the fourth column.

Name of Witness	Record Page	Occupation	How long Dope and Koke have meant Coca-Cola	Territorial Experience
S. C. Dobbs	320, 321	Salesmanager The Coca-Cola Company	10 or 12 yrs.	United States
W. L. Sams	333, 334	Salesman The Coca-Cola Co.	16 yrs.	Ga., Fla., E. Tenn., W. Va. Va. & Md.
Geo. J. Martin	339, 340, 346, 347	Salesman The Coca-Cola Co.	Dope, 15 yrs.; Koke, about 8 yrs.	N. & S. Carolina, Tenn., Ky., Ohio, Mich., Wis. Ind., Ala., Ga. S. C. & Ga.
Oscar C. Hightower	367	Salesman The Coca-Cola Co.		N. C. & part of Va.
M. Tomlinson	368	Salesman The Coca-Cola Co.		Atlanta, E. Tenn., N. Ga. Fla. & S. Ga.
M. L. Ramey	369, 370	Traveling Salesman, The Coca-Cola Co.		
W. H. Troutman	370	Salesman The Coca-Cola Co.		
D. E. Bolton	407	Trade-name Expert (Special Representative The Coca-Cola Co.)	Varying times as shown by statements of various retailers visited.	Ga., S. C., N. C., Va.
T. L. Boswell	421 to 437	Same as D. E. Bolton	Same as D. E. Bolton	Miss., Ala., Fla.
T. M. Murphy	498 to 509	Same as D. E. Bolton	Same as D. E. Bolton	Ky., Ark., Mo.
Sam Friend	836 to 851	Same as D. E. Bolton	Same as D. E. Bolton	Georgia & Tex.
F. C. Peace	683 to 706	Same as D. E. Bolton	Same as D. E. Bolton	Miss., La., Tex.
Philip Jansen	936 et seq.	Special Investigator	Same as D. E. Bolton	Chicago
Nick D. Chotas	448	Dispenser of Soda Water	9 yrs.	Atlanta, Ga.
F. W. Green	451	Druggist	15 to 16 yrs.	Atlanta, Ga., Elwood, Ind.
G. A. Harbour	457	Conducting Soda fount.	5½ yrs.	Atlanta, Ga.
I. L. James	460, 461	Soda fount		Atlanta
Alexander Cruickshank	463, 464	Cigars and soda water	To my certain knowledge 8 yrs.	Atlanta
Chas. Kingsberry	466	Cigars and soda water	About 6 yrs.	Atlanta
F. H. Smith	469	Soda water	8 yrs.	Atlanta
J. D. T. Lawrence	471	Soda water	6 or 7 years anyhow	Atlanta
F. F. Langenfeldt	473	Soda fount	8 yrs.	Atlanta
D. G. Wise	474	Soda fount	12 yrs.	Atlanta
W. R. Stovall	477	Soda business		Atlanta
Chas. Alexiou	478	Soda fount		Atlanta
J. F. Redding	479	Soda fount	Ever since I have dispensed drinks	Atlanta
Chas. B. Giardina	480	Soda fount		Atlanta
W. A. Medlock	482, 483	Soda fount		Atlanta
L. Stephens	484, 485	Soda Dispenser	Few years	Atlanta
George Moore	487, 488	Jobber of Coca-Cola and man'fr ice cream	18 yrs.	Atlanta
Pete Verge	489	Soda water		Atlanta
W. N. Tumlin	491	Soda fount	7 or 8 yrs.	Atlanta
W. A. Hartman	492	Soda water		Atlanta
T. C. Marshall	494	Soda fount	20 yrs. Dope, 10 yrs. Koke	Atlanta
J. B. Pendergrast	496, 497	Druggist	At least 10 yrs. for Dope and about that for Koke	Atlanta

Earl Kimbrough	511	Soda Dispenser		Atlanta
John Mehos	511, 512	Soda fount		Atlanta
Clyde Park	512, 513	Soda fount		Atlanta
A. P. Blatsios	513, 514	Soda business		Atlanta
G. H. Upchurch	522, 523	Soda fount	Fully say 9 or 10 yrs.	Mobile, Ala.
Dave S. Bauer	534	Soda fount	24 yrs.	Mobile
E. R. Albright	545, 548, 549	Soda fount		Mobile
Geo. L. Seibert	552	Soda Dispenser		Mobile
J. W. Graham	557	Employed at Drug Store		Mobile
R. W. Elliott	563	Soda Dispenser	12 or 13 yrs.	Mobile
I. V. Wood	566, 570, 571	Druggist	20 or more odd yrs.	Mobile
G. S. Morse	646	Dispenser		New Orleans
C. G. Peters	654	Druggist	7 or 8 yrs. to the best of his knowledge	New Orleans
P. A. Capdau	665	Owner of Drug Store		New Orleans
O. P. Bland	670	Owner of confectionery stand		New Orleans
H. W. Flowers	676	Dispenser		New Orleans
A. J. Miller	680	Soda fount		New Orleans
E. Schwartzenburg	681	Dispenser		New Orleans
R. W. Brown	682	Soda water		Vicksburg and New Orleans
Cecil V. Rodgers	735, 736	Druggist	Conservatively 15 or 16 yrs.	Dallas, Tex.
Jacob Schrodt	740, 741	Druggist	18 yrs. at least	Dallas
Chas. R. Smith	746	Druggist	12 or 15 yrs.	Dallas
J. W. Arrant	748, 749	Soda Dispenser	For 8 yrs.	Dallas
A. M. Timms	752, 753	Soda Dispenser	12 yrs.	Dallas and New Orleans
James F. Rogers	754	Drug business		Dallas
R. L. Asbell	756, 757	Soda Dispenser		Dallas
D. H. Hardin	759, 760	Soda Dispenser	4 yrs.	Dallas
S. Y. Althoff	761	Mgr. Owl Drug Store	6 yrs.	Dallas
O. M. Brown	764	Dispenser	5 or 6 yrs.	Dallas
T. Q. Martin	765	Proprietor, Soda fount		Dallas
E. B. Thomas	766, 767	Owner of confectionery stand	As far back as he can remember	Dallas
T. C. Lupton	771	(Written orders abbreviating the name Coca Cola to Koke sent to the Dallas Coca-Cola Bottling Company.)		
C. D. Kingston	790, 791	Druggist	5 or 6 yrs.	Denison, Tex.
F. L. Skillen	792, 793	Druggist	15 yrs.	Dallas
D. P. English	801	Druggist	Possibly 8 or 10 yrs.	Dallas
E. Ewer	808	Drug business		Dallas
Geo. C. Kershaw	811	Confectionery business	15 yrs.	Dallas
Tony Giarraputo	814	Confectionery business		Dallas
W. H. Ramsey	820	Drug business		Denison
F. W. Hayden	821	(Sends in orders to The Coca-Cola Bottling Co., at Dallas, Tex., for Koke.)		
J. B. Smith	823, 825	(Sends in orders for Koke to the Dallas Coca-Cola Bottling Company.)		
Mrs. C. E. Flagg	826	Confectionery and Floral Shop		Dallas, Tex.
Peter Camarinos	827	Soft drinks		McKinney, Tex.
T. J. Britton	829	Retail drug business	May be longer than 7 yrs.	Dallas, Tex.
B. W. Fuller	833	Soda Dispenser		Dallas, Tex.
E. T. Langan	894, 895	Owner of a lunch room	12 yrs.	Chicago, Ill.
T. J. Haizlip		Soft drinks	Since 1893	Sherman, Tex.

TRADE NAME EXPERTS.

In addition to the testimony of trade witnesses who swear that **Koke** is and for many years has been the familiar nickname for **Coca-Cola**, The **Coca-Cola Company** has produced testimony of a different kind to establish this fact. Representatives of The **Coca-Cola Company** were sent to a large number of towns and called at soda fountains for **Coca-Cola**, **Koke** and **Dope** on separate occasions and at the same time observed customers using the same words. In every instance the syrup to make the drinks called for under the names **Coca-Cola**, **Koke** and **Dope** was drawn from one and the same container. The proprietor or dispenser was then interviewed and asked what was meant by **Koke** and **Dope** and in each instance replied that these words were short names for **Coca-Cola**. In many places consumers' tests were made. A consumer's test is conducted in the following way: A representative of the **Coca-Cola Company** stationed himself for a considerable period of time at the fountain, and whenever a purchaser used the name **Koke** or **Dope** the dispenser in the presence of the witness, asked the person using such word what he meant. In every instance the answer was **Coca-Cola**.

Attention is called to the fact that in the tabulation which follows the name "Dope" as a nickname for **Coca-Cola** is more extensively used in the territory east of the Mississippi river than is "Koke," but that west of the Mississippi river "Koke" is the predominant nickname for **Coca-Cola**.

The **Koke Companies** sell the same product under two names "Dope" and "Koke." **Koke** and **Dope** are the identical thing. Mayfield admits this. (Rec., 1687.) East of the Mississippi river, where "**Coca-Cola**" is known by the nickname "Dope," the word "Dope" is used by the

Koke Companies upon the labels on the containers in which their product is sold. West of the Mississippi river, where "Coca-Cola" is known by the nickname "Koke," the Koke Companies' product, which is identical with that sold under the name Dope, is sold exclusively as "Koke."

J. G. Van Winkle, Secretary of Koke Company of Texas (Rec., 1715), says: "The product of the Koke Company of Texas has always been sold under the name of 'Koke,' never under the label 'Dope.' Some of the other Koke Companies use it ('Dope'); that is my understanding."

The following is a tabulation of the expert testimony on nicknames:

THOMAS LESLIE BOSWELL (Rec., 421):

422 Towns visited: Collins, Ellisville, Laurel, Meridian, West Point, Starksville, Macon, Columbus, Okolone, Corinth, Iuca, Ripley, Pontotoc and Oxford, Miss. Montgomery, Tuskegee, Selma, Eufaula, Dothan, Birmingham and Red Bay, Ala. Pensacola, Tallahassee, Lake City, Jacksonville, Palatka, Ocala and Tampa, Florida.

The following is a tabulation of the experience of the witness in asking for "Coca-Cola," "Koke" and "Dope" on separate occasions and his observation of customers using these same words. All were served with drinks made from syrup drawn from one and the same container. (* indicates the container was marked "Coca-Cola.") The first column indicates the page of the record. The second the name of the town. The third the name of the store. The fourth the name of the proprietor or dispenser. The fifth the number of calls for "Coca-Cola" during the witness' observation. The sixth the number of calls for "Dope" during the period of the witness' observation. The seventh the number of calls for "Koke" during the period of the witness' observation.

			Propr. or Dispenser	CC	D	K
424	West Point, Miss.	*P. H. White Drug Co.	242 Jim Figure, d			
		City Hall Drug Store	243 Mr. Turnipseed			
		E. P. Wilson Drug Co.				
	West Point	J. B. Johnson	244 Mr. Tomlinson, d.			
		P. L. Bouchillon	P. L. Bouchillon			
		Barksdale & Bennett Grocery Co.				
	Starksville	*Jackson & Son Drug Co.	J. A. Jackson			
	Starksville	J. A. Clardy	J. A. Clardy	1	2	
	Starksville	J. T. Kirk		1		
	Starksville	*Jas. J. Gill				1
	Starksville	Cox Bros. Grocery	Earl Cox			3
	Macon	*C. L. Ferris Book Store	C. L. Ferris	1	2	
		*Nichols & Dorah Gro. Co.	249 L. T. Dorah			
			J. Q. Nichols			
		Gem Pharmacy	E. E. Hammond, P.			
			T. W. Jackson, Jr., d.			
		*Murphy Drug Store	Ed. M. Murphy, P.			
			S. T. Pennington, d.			
			Henry Pattee, d			
		L. C. Tucker, Grocery	L. C. Tucker			
	Columbus	Johnson & Cain Drug	252 E. C. Johnson and	1	0	1
		Store	S. L. Cain, Ps.			
		Weaver & Harrington	253 W. B. Harrington			
		Street's Drug Store	W. B. Street		2	
		*John R. Laws, Druggist				
		Wilson Drug Store	255 Mr. Wilson			1
	Columbus, Miss.	L. E. Lides Drug Store	L. E. Lides, P.			
		L. E. Mayfield Drug Co.	L. E. Mayfield		1	
	Okolone	Elliott & Bell	Mr. Bell, P.		3	
		L. E. Gast Bros., Gro.	L. E. Gast			
		Bearden & King Drug Store	W. E. Bearden		2	
		Liggen & Bros.	258 R. H. Liggen, P.			
	Corinth	C. A. Turner, Gro.	C. A. Turner, P.	2		
		H. E. Walker	R. C. Battles	4	2	1
		J. M. Mitchell's Pharm.	J. A. Mitchell, P.			
		Henry's Pharmacy	Mr. Henry, P.			
		*McVay & Co.	R. R. McVay		2	
		H. M. McAnnis Drug Co.	261 Mr. McAnnis	1	2	
		H. M. Stone's restaurant and bakery	H. M. Stone			
		Corinth Drug Co.	263 H. M. & T. F. Seigman, Ps.			
	Holly Springs	Pure Drug Co.	K. C. Campbell, P.			
			J. L. Alverson, d.			
		D. J. Oliver	D. J. Oliver, P.	2	2	
			265 Joe Howard, d.			
425		L. H. Dancy	L. H. Dancy, P.	1	1	
		W. C. Robinson	266 W. C. Robinson		1	
	Ripley	C. M. Pfyfer & Co.	267 C. M. Pfyfer	1	1	
		R. R. McCord	R. R. McCord	1	1	
	Red Bay, Ala.	Red Bay Drug Co.	J. A. Gray, P.		2	
	Pontotoc, Miss.	Furr & Carter Drug Co.	J. M. Furr and		1	
			R. E. Carter, Ps.			
	Pontotoc	C. D. Mitchell & Co.	271 C. D. Mitchell, P.	1	1	
			B. B. Anderson, Cl.			
			S. V. Pitts.			
			E. C. Nesbitt, d.			

		Prop. or Dispenser	CC	D	K
Oxford	Chilton Drug Store	C. W. Chilton, P.			
	Rowland Drug Store	Herron Rowland, P.			
	Bramlett & Sons	Eugene Bramlett			
Montgomery, Ala.	G.M.Chatfield Drug Co.	G. M. Chatfield	4	2	1
	J. Johnson Moore	Carter Maston, D	2	4	
		277 J. Johnson Moore, P.			
	May's Bakery and Confectionery	Stewart and Duncan May, Ps.			
	Lyon Head Drug Store	C. T. Ruff, P.		3	1
Tuskegee	L. C. Lewis	Mr. Lewis, P.		2	5
	Hardin Howard Drug Store	Hardin Howard			2
	Johnson Bros. Drug Store	281 E. D. Johnson, P.			2
Selma	Rockmills Bros.	282 R. R. Rockmills	6	5	
	G. A. Swift	283 E. J. Word, d.	1		1
	Tillman Drug Co.	W. P. Cook, Mgr.	3	5	2
Pensacola, Fla.	Central Pharmacy	M. B. Scott, Mgr.		2	
	J. S. Pinkussohn Cigar Stand	285 R. H. Capers, d. and Mgr.		4	9 1
	Balkcom Drug Co.	B. F. Balkcom, Mgr.	1	4	
Tallahassee	Holmes Drug Co.	J. McNair		2	6
	Hardee-Smith Co.	287 C. N. Tombs, P. L. K. Cohen			1
		J. Johnson, Clk.			
Lake City	De Soto Drug Co.	M. H. Tibbals, Mgr.			
	C. E. Lewis	C. E. Lewis, P.		1	
	A. R. Wise & Co.	A. R. Wise		1	5
Jacksonville	Dr. William D. Jones Drug Store	Wm. D. Jones, P.			2
	J. Daniel Boone & Co.	L. M. Holmes, Mgr	1	3	
	Clark's Drug Store	E. C. Clark, Mgr.	5	10	
Palatka	City Drug Co.	J. H. Haughton, P.	2		2
	Ray's Confectionery	Jas. Ray, P.		2	
	Smith's Confectionery	L. H. Smith, P.			
Ocala	Gerrig's Drug Store	J. J. Gerrig		4	2
	T. W. Traxler	T. W. Traxler, P.			1
426	Court Pharmacy	J. B. Harrel and H. N. Walters		2	
		303 W. H. Tibbets, P.	4	6	
Tampa	Tibbett's Corner Val's Corner	Val. M. Antuomo, P	4	1	
		B. L. Robinson, Mgr.			
	Cotter's Pharmacy	Le Roy Cotter, P.	7	7	
Dothan, Ala.	M. A. Ellison Drug Co.	R. C. Ellison			
	McCullom's Drug Store	N. H. McCullom, P.	2	3	
		D. S. Nash, Pre- scription Clerk			
		Albert Stevenson, disp.			
	Nix Drug Co.	R. Q. Nix, P.		2	3
		1 call for a "Shot"			
Birmingham	Parker Drug Co.	Roy Armstrong, Mgr.		4	8
		Geo. W. Griffith, d.			
	John W. Patton Drug Co.	309 C. Q. Loyd, Mgr.		1	
	Adam's Pharmacy	A. R. Moody, Mgr.	3	3	
	Proprietors, Managers and Dispensers	Calls for Dope	Calls for Koke	Calls for Coca Cola	Misc. Calls
Towns					
29	160	150	26	120	1
Consumer's Tests					
About 22.					

429 Out of the twenty-two customers' tests, there were 1320 calls for "Coca-Cola," 1639 calls for "Dope," 104 calls for "Koke," 29 miscellaneous calls. In each instance ("Dope" and "Koke" or miscellaneous) the dispenser asked the consumer "Coca-Cola"? or "Do you mean 'Coca-Cola?'" and the customer replied in each instance that only "Coca-Cola" was meant.

426 The following is a tabulation of the witness Boswell's Consumer's Tests at the fountains in the following places during the time specified in the presence of the witness. Every person using the word "Koke" and "Dope" in ordering was asked by the dispenser what he meant and in each instance the answer was "Coca-Cola." The first column indicates the page of the record. The second the name of the town. The third the name of the store. The fourth the number of calls for "Coca-Cola." The fifth the number of calls for "Dope." The sixth the number of calls for "Koke."

			CC	D	K
427	Corinth, Miss.	Dr. M. M. McAnnis' Drug Store	62	103	12
	Holly Springs	D. J. Oliver	27	21	5
	Pontotoc, Miss.	C. D. Mitchell & Co.	37	5	3
	Oxford, Miss.	Chilton Drug Store	46	52	6
	Montgomery, Ala.	276 G. M. Chatfield Drug Co.			
		Disp. Wilkins, Rankin, White, Bradford	51	41	9
	Montgomery, Ala.	J. Johnson Moore:			
		Disp. Wade Pruitt and Carter Masten	41	64	1
	Montgomery, Ala.	May's Bakery and Confectionery (20 min.)	3		1
	Selma, Ala.	Rockmill Bros.	22	20	
		C. H. Hurley			
		J. Eagle			
	Pensacola, Fla.	Central Pharmacy	8	6	3
		Mgr. Mr. Scott			
		Disp. C. E. Bond			
		R. T. Shuttleworth			
		Dixie Golden			
	Tallahassee, Fla.	Holmes Drug Co.	16	27	
		287 Prop. J. E. McNair			
		Disp. J. C. Savage			
		J. R. Hartsfield			
	Lake City, Fla.	A. R. Wise & Co.	10	14	4
		Disp. J. L. Reims			
		Wilbur Townsend			
	Jacksonville, Fla.	Clark's Drug Store	178	139	6
		E. C. Clark, Mgr.			
		Disp.: R. H. Holmes			
		Wm. Holmes			
		R. Scott			
		H. T. Stone			

Palatka, Fla.		City Drug Co.	5	11	
		Prop. J. H. Haughton			
		Disp.: R. B. Holden			
		N. O. Riles			
		Pelton Wilkerson			
Ocala, Fla.		Court Pharmacy	22	32	3
	302	Prop. J. B. Harrell			
		Disp.: J. W. Dewey			
		Bedford Caldwell			
		Sam Burford			
428 Tampa, Fla.		Cotter's Pharmacy	107	142	3
	304	Prop. Le Roy Cotter			
		Disp.: Harry B. Davis			
		H. C. Brannan			
		B. C. Knight			
		Roy Hanter			
		Carter C. Loyd			
Dothan, Ala.		Nix Drug Co.	15	21	
	307	Prop. R. Q. Nix			
		Disp.: O. W. Sagg			
		Harvey Gover			
Birmingham, Ala.		John W. Patton Drug Co.	65	40	3
	309	Mgr. C. A. Loyd			
		Disp.: J. E. Curry			
		Vance Thompson			
		W. D. Calloway			
Birmingham		Adams' Pharmacy	265	425	27
	310	A. R. Moody, Mgr.			
		Disp.: R. T. Wimson			
		R. A. Pruitt			
		H. L. Cage			

(Also 13 calls for "Shot," 2 calls for "Shot-in-the-arm;" 1 call for "Candler's High-Ball;" 2 calls for "One-with and one-without.")

DAVID EMORY BOLTON (Rec., 399) :

400 Towns visited: Augusta, Ga., Aiken, S. C., Blackville, S. C., Barnwell, S. C., Allendale, Denmark, Bamberg, Branchville, Orangeburg, St. Matthews, Columbia, Newberry, Clinton, Laurens, Enoree, Greenwood, Abbeville, Belton, Pelzer, Anderson, Seneca, Westminster, Easley, Greenville, Spartanburg, Gaffney and Blacksburg, S. C. Charlotte, Winston-Salem, Greensboro, N. C. Danville, Va. Raleigh, Wilmington, N. C. Norfolk, Va., Petersburg, Richmond, Alexandria, Lynchburg, Va. Asheville, N. C., Charlottesville, Front Royal, Va., Petersburg, W. Va, Reidsville and Salisbury, N. C.

The following table indicates the places where the witness called for "Coca-Cola," "Koke" and "Dope" on separate occasions and observed customers using these

same words. All were served with drinks made from syrup drawn from one and the same container. (*Indicates that the container was marked "Coca-Cola." (The proprietor and dispenser in each instance was interviewed and stated that "Koke" and "Dope" were understood to mean "Coca-Cola.")

	Town	Store	Prop. or Dispenser
402	Augusta, Ga.	Howard Drug Store No. 1	168 Mr. Howard, Prop.
	Augusta	*Howard Drug Store No. 2	169 Earl Cummins, disp.
	Augusta	T. A. Cardell	172 Mr. Howard 172 T. H. Garfield, disp. 170 Mr. Cardell 170 Nathaniel Fairbrother, disp.
	Augusta	Watson Drug Co.	173 Jacob Watson 174 F. G. Allen, disp.
	Augusta	The Model Gro. Store	175 Mr. Holmes, Prop.
	Augusta	H. J. Morkwater	Mr. Morkwater
	Aiken, S. C.	Hall's Pharmacy	176 Mr. Henderson, Mgr.
	Aiken	Sanders' Pharmacy	177 Mr. Sanders, Prop.
	Aiken	Mr. Overstreet	Mr. Overstreet, Prop.
	Blackville	Hotel Pharmacy	179 Mr. Wesenger, Mgr. or Prop.
	Blackville	E. D. F. Pharmacy	Mr. Epps, Mgr.
	Barnwell	Deason Drug Co.	O. A. Best, disp.
	Barnwell	F. H. Huggins Drug Store	
	Allendale	Searson's Drug Store	R. B. Searson, Prop.
	Denmark	Denmark Drug Co.	Mr. Willis, Mgr.
	Bamberg	Mack's Drug	Mr. McCracken, Mgr.
	Bamberg	Peoples Drug Co.	Mr. J. T. Kelly, Mgr.
	Branchville	Steadly's Soda Fountain	W. D. Steedly, Prop. and disp.
	Orangeburg	Lowman Drug Co.	W. A. Cherry, Mgr.
	Orangeburg	Doyle Drug Co.	M. S. Williams, Mgr.
	St. Mathews	Fair's Pharmacy	W. W. Fair, Mgr.
	Columbia	Hudkins Drug Co.	Manager or Prop.
	Columbia	Brim & Little Drug Co.	Manager or Prop.
	Columbia	Mirt Drug Co.	Manager or Prop.
	Columbia	Pinkussohn Ciger Co.	Manager or Prop.
	Columbia	Taylor Drug Co.	Manager or Prop.
	Columbia	Heywood's Pharmacy	Manager or Prop.
	Newberry	Newberry Drug Co.	W. O. Mills, Mfr.
	Newberry	Gilder & Weeks Drug Co.	C. D. Weeks, Mgr.
	Clinton	Clinton Pharmacy	W. C. Harper, Mgr.
	Clinton	Young's Pharmacy	J. H. Young, Prop.
	Laurens	Ray's Pharmacy	C. K. Ray, Mgr.
	Laurens	Ramsey's Pharmacy	B. F. Ramsey, Prop.
	Enoree	Enoree Drug Co.	M. S. Dantzler, Mgr.
	Greenwood	Oregon Drug Co.	E. L. Morris, Mgr.
	Greenwood	Greenwood Candy Kitchen	Geo. Alexas, Mgr.
	Abbeville	Mulford Drug Co.	C. A. Mulford, Mgr.
403	Abbeville	Abbeville Candy Kitchen	Steve Parthenos, Prop. and Mgr.
	Belton	Donald Wilson Drug Store	G. S. Cuthbert, Mgr.
	Pelzer	Griffin Drug Co.	W. W. Griffin, Mgr.
	Anderson	Red Cross Drug Store	L. W. Seals, Mgr.
	Anderson	Evans Pharmacy	W. N. Webb, Mgr.
	Seneca	Seneca Pharmacy	T. L. Stribbling, Mgr. and Prop.

Westminster	Stonecypher	J. H. Stonecypher, Mgr
Easley	R. F. Smith Drug Co.	Wm. Wyatt, Mgr.
Greenville	Armstrong Drug Co.	J. C. Armstrong, Mgr.
Greenville	Doster-Bruce Drug Co.	O. L. Doster, Mgr.
Greenville	Candyland Ice Cream Parlor	E. S. Bellinger, Mgr.
Greenville	Sloan Drug Co.	Thomas Sloan, Prop.
Spartanburg	K. W. N. Pharmacy	Thomas H. Leber, Mgr
Spartanburg	Green Drug Co.	J. E. Green, Mgr.
Spartanburg	Acropolis Ice Cream Parlor	Steve Bakades, Mgr.
Spartanburg	Elite Ice Cream Parlor	J. A. Metropolis, Mgr.
Gaffney	Cherokee Drug Co.	J. N. Littlejohn, Mgr.
Gaffney	Gaffney Drug Co.	J. C. Greech, Mgr.
Blacksburg	Cousins Drug Co.	W. G. Cousins, Mgr.
Blacksburg	Iron City Drug Co.	T. S. R. Ward, Prop.
Charlotte, N. C.	Jordan's Drug Store	
Charlotte	Moody Drug Co.	E. J. Caton, Mgr.
Charlotte	Jas. P. Stowe Drug Co.	Jas. P. Stowe, Mgr.
Charlotte	Charlotte Drug Co.	Mr. McLarkin.
		Mr. Bullock, Prop.
Winston-Salem	O. Hanlon's Drug Store	E. W. O. Hanlon, Prop.
Winston-Salem	Thompson Drug Store	P. A. Thompson, Prop.
Winston-Salem	Owens Drug Co.	P. J. Brain, Mgr.
Winston-Salem	Hutchins Drug Co.	R. L. Hutchins, Mgr.
Greensboro	Grissom Drug Co.	E. G. Bowers, Mgr.
Greensboro	Sykes Drug Co.	E. C. Sykes, Mgr.
Greensboro	Greensboro Drug Co.	Wm. Johnson, Mgr.
Greensboro	Conyers & Sykes Drug Co.	R. J. Sykes, Mgr.
Danville, Va.	E. M. Wallace Drug Co.	E. M. Wallace, Prop.
Danville	Danville Drug Co.	Harry W. Thomas, Mgr
Danville	Jacobs Drug Co.	J. D. Pruitt, Prop.
Raleigh, N. C.	Thomas & Son Drug Co.	Wm. G. Thomas
Raleigh	Tucker Bldg. Pharmacy	Gilbert Crabtree, Mgr.
Raleigh	Brantley Drug Co.	J. C. Brantley, Prop.
Raleigh	Wake Drug Co.	J. T. Moore, Mgr.
404	Orton Confectionery Co.	E. Dinos, Prop.
Wilmington	Hicks-Bunting Drug Co.	
Wilmington	Woodall-Sheppard Drug Co.	H. M. Cox, Mgr.
Wilmington	Elvington Pharmacy	D. A. Elvington, Owner
Norfolk, Va.	Martin's Pharmacy	
Norfolk	Cummings Confectionery Store	Louis Cummings, Mgr.
Norfolk	Burrow-Martin Drug Co.	J. T. Powell, Mgr.
Norfolk	Truitt's Pharmacy	C. F. Truitt, Prop.
Petersburg	Morrison Drug Co.	J. A. Morrison, Prop.
Petersburg	Harrison Drug Co.	J. B. Harrison, Prop.
Petersburg	Palms Confectionery Co.	W. G. Roberts, Mgr.
Richmond	Muller Drug Co.	T. A. Muller
Richmond	Blair's Drug Store	
Richmond	Crenshaw Cigar Co.	W. D. Crenshaw
Richmond	McKay Cigar Co.	T. R. Ennos, Mgr.
Richmond	Grant Drug Co.	W. S. Cavedo, Mgr.
Alexandria	Warfield Drug Co.	Edgar Warfield, Jr., Prop.
Alexandria	Gubson Drug Co.	Richard Gubson
Lynchburg	Boston Confectionery	Lewis Vaynes, Prop.
Lynchburg	Craghill Jones Drug Co.	J. P. Jones, Mgr.
Lynchburg	Lamber's Pharmacy	E. D. Williams, Mgr.
Asheville, N. C.	Globe Cafe & Candy Kitchen	H. C. Theobald, Mgr.
Asheville	Raysor Drug Co.	C. A. Raysor
Asheville	Carmichael Pharmacy	R. C. Hawkins, Mgr.
Asheville	Smith's Drug Co.	Frank Smith, Mgr.
Charlottesville, Va.	Pence & Sterling Drug Co.	R. S. J. Sterling, Mgr.

Charlottesville	Fitzhugh Bros. Drug Co.	J. S. Fitzhugh, Mgr.
Charlottesville	Robert E. Clark Drug Store	Robert Clark, Prop.
Front Royal	Trout & Turner Drug Co.	M. B. Turner, Mgr.
Front Royal	Venable's Drug Store	C. M. Venable, Prop.
Petersburg, W. Va.	Wise Grocery Store	W. C. Wise, Prop.
Petersburg	Judy & Mooman Drug Co.	G. Mooman, Mgr.
Reidsville, N. C.	Tucker Drug Co.	R. H. Tucker, Prop.
Reidsville	Gardner Drug Co.	T. L. Gardner, Prop.
Salisbury	Main Pharmacy	Stamy Carter, Mgr.
Salisbury	Peoples Drug Co.	J. R. Trotter, Mgr.
Salisbury	Smith Drug Co.	Sam Carter, Mgr.

405 At the fountains of the following places, in the presence of the witness, every person using the word "Koke" and "Dope" in ordering drinks was asked by the dispenser what he meant, and in each instance the answer was "Coca-Cola." The first column indicates the page of the record. The second column indicates the name of the town. The third column indicates the name of the fountain. The fourth column indicates the name of the dispenser. The fifth column the number of calls for "Coca-Cola" observed. The sixth column the number of calls for "Dope" observed. The seventh column the number of calls for "Koke" observed.

			CC	D
406	Blackville, S. C.	Hotel Pharmacy	T. D. Box, disp.	8 22
	Barnwell	Deason Drug Store	O. A. Best, disp.	
	Allendale	Searson's Drug Store	F. H. Farmer, disp.	18
	Denmark	Denmark Drug Co.	Willis, Mgr.	6
	Bamberg	Macks Drug Store	Luke Curry, disp.	27
	Orangeburg	Loman Drug Co.	Ed Langley	57
	St. Matthews	Fair's Pharmacy	Dixon Whitstone, disp.	28
	Columbia	Hudgins Drug Store	H. G. Sistrunk, disp.	43
	Columbia	Taylor Drug Co.	J. C. Bruce, disp.	62
	Newberry	Newberry Drug Co.	Dispenser	34
	Clinton		Guy Mayson	33
	Laurens	Ray's Pharmacy	Dispenser	61
	Greenwood	Greenwood Candy Kitchen	Mr. Alexas, Prop. and disp.	47
	Abbeville	Abbeville Candy Kitchen	Steve Parthenos, Prop. and Mgr.	19
	Belton	Donald Wilson Drug Co.	Lewis Cox, disp.	32
	Anderson	Evans Pharmacy	Will Adams	41
	Greenville	Armstrong Drug Co.	J. A. Rebow, disp.	38
	Greenville	Candyland Ice Cream Parlor	Steve Georgon, disp.	51
	Spartanburg	Acropolis Ice Cream Parlor	E. C. Morrow, disp.	22
	Gaffney	Cherokee Drug Co.	Dispenser	27
	Blacksburg	Iron City Drug Co.	Geo. Roberts, disp.	31
	Charlotte, N. C.	Charlotte Drug Co.	J. T. Neighbors, disp.	26
	Winston-Salem	Owens Drug Co.	L. L. Nunn, disp.	17
	Greensboro, N. C.	Conyers & Sykes Drug Co.	K. C. Clendein, disp.	51
	Raleigh	J. C. Brantley Drug Co.	P. D. Gattis, disp.	37
	Danville, Va.	Jacobs Drug Co.	Lloyd Bray, disp.	21
	Wilmington, N. C.	Elvington Pharmacy	W. B. Wilson	26

198	Norfolk, Va.	Cummings Confectionery	Chas. Taylor, disp.	18
199	Petersburg	Palm Confectionery Store	W. J. Adams, disp.	12
199	Richmond	Grant Drug Co.	E. M. Farris, disp.	38
200	Alexandria	Gubson Drug Co.	W. L. Arnold, disp.	18
200	Lynchburg	Craghill-Jones	E. E. McDaniel, disp.	12
200	Asheville, N. C.	Carmichael Pharmacy	J. C. Brown, Jr., disp.	18
201	Charlottesville, Va.	Pence & Sterling Drug Co.	W. R. Munday, disp.	12
201	Front Royal	Trout & Turner Drug Co.	L. J. Fristo, disp.	8
201	Reidsville, N. C.	Tucker Drug Co.	J. W. Burrus, disp.	5
202	Salisbury	Main Pharmacy	L. D. Joyner, disp.	9

SAM FRIEND (Rec., 836):

Towns visited: Griffin, Barnesville, Macon, Conyers, Covington, Monroe, Winder, Lawrenceville, Buford, Roswell, Gainesville, Toccoa, Royston, Athens, Elberton, Madison, Greensburg, Washington, Thomson, Warrenton, Milledgeville, Jonesboro, Locust Grove, Stockbridge, McDonough, Jackson, Flovilla, Monticello, Eatonton, Montezuma, Marshallville, Americus, Dawson, Ellaville, Cuthbert, Buena Vista, Albany, Ashburn, Moultrie, Douglas, Fitzgerald, Giolla, Sylvester, Cordele, Ft. Gaines, Blakely, Bainbridge, Adel, Donaldsonville, Thomasville, Pelham, Camilla, Meigs, Quitman, Boston, Valdosta, Waycross, Georgia. Dallas, Houston, San Antonio, New Braunfels, San Marcos, Austin, Taylor, Temple, Belton, Ennis, Corsicana, Texas.

Friend called at the following places for "Coca-Cola," "Koke" and "Dope" on separate occasions and observed customers using the same words. In each instance he and they were served with drinks made from syrup drawn from one and the same container. (*Indicates container was marked "Coca-Cola.")

837 The first column indicates the page of the record. The second the name of the town. The third the name of the store, the fourth the length of time during which the witness stayed about the fountain and observed the calls of customers. The fifth the number of calls for "Coca-Cola." The sixth the number of calls for "Dope." The seventh the number of calls for "Koke" during the period of the witness' observation.

			hr.	min.	CC	D	K
838	Griffin, Ga.	*Brooks County Drug Store	1	25	7	9	
		*Carlisle & Ward		55	5	7	
		Derrick Drug Co.		55	2	6	
		R. N. Mitchell Drug Store		35	6	5	
	Barnesville	J. H. Blackburn	1	10	3	6	
		Barnesville Drug Co.		55	4	5	
		Anderson Drug Co.		50	3	6	
		Barnesville Drug Co.		55	4	3	
		Anderson Drug Co.		35	2	4	
		J. H. Blackburn Drug Co.		40	3	5	
	Macon	Saunders Drug Co.	1	20	5	11	
		Chapman's Drug Store	1	29	5	11	
		Taylor & Bayne Drug Co.	1	15	9	11	
		J. H. Lamar Drug Co.	1	15	5	6	
		Murray & Sparks Drug Co.	1	30	14	5	
		King & Oliphant Drug Co.	1	05	8	8	
		L. C. Small Drug Co.	1	20	5	11	
		Saunders Drug Co.		20	2	2	
		Chapman's Drug Store		15	1	2	
		Taylor & Bayne Drug Co.		20	1	3	
	Conyers	W. H. Lee Drug Co.	1	20	3	6	
		Street's Drug Store		55	3	4	
	Social Circle	Knox Pharmacy	1	25	5	3	
	Covington	Smith's Drug Store	1	20	3	7	
	Covington	City Pharmacy		50	4	12	
		C. C. Brooks	1	25	4	9	
	Monroe	Carmichael Drug Co.	1	30	5	8	
		W. S. Stovall	1	25	4	7	
		Chaffin Drug Co.	1	05	6	7	
	Winder	G. W. De Lapiere & Sons	1	15	4	6	
		J. T. Wages' Drug Store		45	3	7	
		L. E. Herren's Drug Store	1	15	2	6	
839	Lawrenceville	*Ezzard-Montgomery Drug Co.	1		2	5	
		Kelley Drug Co.	1		5	6	
	Buford	Buford Pharmacy	1	10	3	3	
		Prater & Murphy	1	10	3	4	
		J. T. Rowe Drug Co.		50	2	3	
	Roswell	Roswell Drug Co.		55	2	4	
		J. G. Potter Drug Store	1	10	2	3	
	Gainesville	Piedmont Drug Co.	1		3	7	
		Robertson Drug Co.	1	20	3	4	
		Stringer's Ice Cream Parlor	1	15	4	7	
	Toccoa	Barron Bros. Ice Cream Parlor	1		3	4	
		*Peoples Drug Store	1	15	3	5	
	Royston	Ridgeway Drug Co.	1	30	5	5	
		Royston Drug Co.	1	20	4	4	
	Athens	*Poss' Place	1	25	5	10	
		*Bland Bros.	1		2	4	
		*Costa's Place	1	05	7	15	
		*M. & W. Cigar Co.	1	15	5	8	
	Elberton	*Herndon's Drug Store	1	10	4	7	
		*Cleveland Drug Co.	1	05	4	6	
		Rapley & Manley	1	15	4	5	
	Madison	*Atkinson Drug Co.	1	45	5	2	
		*Tunnison's Phar.	1	35	4	5	
	Greensboro	*Rice Drug Co.	1	30	6	4	
		Armour Drug Co.	1	05	4	5	
	Washington	*Moore Bros.	1	30	2	4	
		J. B. Green	2	10	3	6	
	Thomson	A. J. Matthews	1	45	3	4	

		hr.	min.	CC	D	K
840	Warrenton	*Gibson Drug Co.	1	25	4	5
		*Evans Drug Co.	1	30	2	4
		*Baker's Soft Drink Stand	1	35	3	7
	Milledgeville	*Culver & Kidd	1	15	3	6
		Barrett's Drug Store	1	10	2	6
		Ennis Drug Co.	1	30	5	5
	Jonesboro	Cousins Drug Co.		50	2	2
	Locust Grove	Locust Grove Drug Co.		50	2	2
	Stockbridge	Ward Drug Co.	1	45	1	
	McDonough	*McDonough Drug Co.	1	35	3	2
		*Horton Drug Co.	1	25	2	3
	Jackson	*The Owl Drug Co.	1	20	5	4
		*Slaton Drug Co.	1	15	6	5
		Woods & Carmichael Drug Co.	1	15	4	9
	Flovilla	*A. F. White Drug Co.	1	25	4	8
	Monticello	Furse Drug Co.	1	40	6	6
		*Jordan Drug Co.	1	40	5	9
	Eatonton	*Belvin's Drug Store	1		3	3
	Eatonton	*Central Pharmacy	1	20	2	4
		*D. L. Thomas Drug Store	1	05	4	4
	Montezuma	*A. C. Richardson & Son	1	25	3	4
		*Read's Drug Store	1	25	3	6
		Walker Drug Co.	1	15	5	4
	Marshallville	*Booton's Drug Store	1	30	1	2
	Americus	Howell & Prather	1	30	4	10
		Hook's Drug Store	1	45	5	11
	Dawson	*Tanner Drug Co.	1	15	4	5
		*City Pharmacy	1	25	4	7
		*Dawson Drug Co.	1	20	1	5
	Ellaville	*City Drug Store	1	30	1	1
	Cuthbert	Moore Drug Co.	1	20	3	4
		*Zuber's Soft Drink Stand	1	15	6	11
	Buena Vista	*City Drug Store	1		2	3
	Albany	*Albany Drug Co.	1	20	5	9
		*Royal Ice Cream Parlor	1	15	8	9
		Cash Drug Store	1	15	7	12
		Bell Drug Co.	1	05	7	12
	Ashburn	*Ashburn Drug Co.	1	30	2	6
	Tipton	Mills Drug Co.	1	35	4	7
		*Peoples Ice Cream Parlor	1	25	5	9
		Brooks Drug Store	1	20	3	7
	Moultrie	*Williams Drug Co.	1	25	2	5
	Moultrie	Watson Drug Co.	1	15	2	7
		Hawkins Drug Store	1	05	5	9
	Douglas	Farmer's Drug Store	1	25	3	7
	Douglas	*Sapps Drug Store	1	15	6	6
		*Union Pharmacy	1	30	3	6
	Fitzgerald	*Goodman Drug Co.	1	35	1	4
		*Dixie Pharmacy	1	15	1	6
		National Drug Co.	1	30	3	6
		Adams Candy Kitchen	1	05	1	6
841	Ocilla	City Drug Store		50		2
		Ocilla Pharmacy	1	20	2	6
	Sylvester	Cash Drug Store	1	10	1	3
		*Bell & Lee Drug Co.		55	2	1
	Cordele	*Cash Drug Store	1	35	3	6
		*Williams Drug Co.	1	15	5	9
		*Stead's Drug Store	1	15	3	9
	Ft. Gaines	*People's Drug Store	1	30	3	11
		John Brown's Place	1	20	8	12

		hr.	min.	CC	D	K
Blakely	Morris Drug Co.		50	1	3	
	*Fryer's Pharmacy		50	1	3	
Bainbridge	Oak City Drug Co.	1	35	1	5	
	Bainbridge Pharmacy	1	20	1	4	
	Mills Drug Store		15	7	12	
Adel	Adel Drug Co.	1	30	3	6	
Donaldsonville	Palace Pharmacy	1	15	1	4	
Thomasville	*Peacock & Nash Drug Co.	1	10	3	8	
	City Drug Store	1	05	4	9	
	Ingram Drug Co.	1	25	6	12	
Pelham	Hill & King Pharmacy	1	30	2	6	
	Consolidated Drug Co.		50	2	6	
Camilla, Ga.	Camilla Drug Co.	1		3	2	
	Stripling's Pharmacy		50	4	3	
Meigs	The Rexall Store		45		1	
	Iselar's Pharmacy	1			1	
Quitman	Horn Drug Co.	1	15	2	5	
	*Savoy Soft Drink Stand	1	10	3	8	
	Brooks County Drug Co.	1	20	3	5	
Boston	City Drug Co.	1	15	1	4	
Valdosta	Vinson Drug Co.	1	10	4	8	
	*Ingram Drug Co.	1	15	5	10	
	Dunnaway's Pharmacy	1	35	1	5	
	Barnes Drug Co.	1	15	6	9	
	Mackey Soft Drink Stand	1	10	4	9	
	Bergstrom & Newberg	1		6	10	
Waycross	*Mills Drug Co.	1		5	5	
	*Spear & Register Drug Co.	1	10	3	6	
	Cherokee Pharmacy	1	15	3	4	
Dallas, Tex.	Cecil V. Rogers Drug Store	1	20	8		13
842	*Britton's Drug Store	1	15	11		11
	*Dimitri & Nimich	1	20	15		24
	*St. George Drug Store	1	15	7		15
	*Southland Pharmacy	1	25	21		39
	Thomas' Candy Kitchen		40	7		11
	Thomas' Candy Kitchen		50	8		14
	Moss' Pharmacy		30	2		5
	Princess Confectionery Store		30	3		
	Marvin's Drug Store		35	5		7
	Tate Drug Store		30	4		2
	Moss' Pharmacy No. 2		30	1		2
	*Ewer Drug Co.		35	1		3
	Hippodrome Confectionery		25	3		4
	*J. A. Skillern & Sons		25	2		5
	Central Drug Store		30	1		1
	*Moore's Commerce Pharmacy		30	2		2
	*Capitol Drug Store		45	2		2
	Bullington Drug Store		30	1		3
	*Treadwell Drug Co.		45	3		2
	Dallas Pharmacy		30	3		1
	*J. A. Skillern & Sons No. 3		30	3		2
	*Oak Cliff Pharmacy		30	2		1
	Furrow Linder		25	1		3
	Red Cross Pharmacy		25	3		1
	Arcade Confectionery		30	1		3
	Texas Cigar Co.		30	4		4
	*Washington Ave. Pharmacy		30	1		2
	Cormick Drug Co.		30	2		3
	J. A. Skillern No. 2		20	2		4
	*Atha's Place		25			2

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Houston, Tex.

844

	hr.	min.	CC	D	K
Cossu's Place	25	1			3
Sanger Bros.	25	4			8
Craig's Place	20	1			
Imperial Pharmacy	20	1			3
*Rhineland's Pharmacy	30	2			4
*Allen's Pharmacy	30	2			1
*Stovall's Pharmacy	20	1			3
*Wimans Pharmacy	25	2			1
Grand Ave. Pharmacy	25	2			1
*Cantor's Pharmacy	30	2			2
Second Avenue Pharmacy	30				1
*Smoot & Crow Drug Store	35	1			1
Fair & Park Drug Store	25	1			2
*Guy's Pharmacy No. 2	35	1			2
*McGwier's Pharmacy	25	1			1
*Robertson Drug Co.	25	3			2
Wilson Drug Store	15	1			1
Hindley's Pharmacy	15				1
Bradley's Pharmacy	15	2			3
*Clayton's Pharmacy	20	1			1
*Canter's Drug Store No. 2	20				1
*Kirby's Drug Store	20	1			2
*Green's Drug Store No. 1	20	2			2
*Green's Drug Store No. 2	20	1			1
English Pharmacy	15	2			3
Eagle Pharmacy	20	1			2
McFarland's Drug Store	15	2			2
*Tremont Pharmacy	15	1			2
Justice Pharmacy	15	2			2
Weichsel Pharmacy	20	2			2
High School Drug Store	15	2			2
Medlock's Pharmacy	15	1			1
*Springfield Drug Store	20	2			2
E. J. Rust & Bros.	15				1
*Clark's Pharmacy	15	1			1
Linder's Pharmacy	20				1
Guy's Pharmacy	15	2			2
*Anderson Drug Co.	25	3	1		5
*Woods-Ehrhart Drug Co.	25	2			3
McFarland's Phar.	30	2			2
Bennett's Phar.	30	1			2
*South End Pharmacy	35	1			2
Hoenecke Pharmacy	40	2			2
Hoenecke Pharmacy No. 2	30	1			1
*Anita Pharmacy	30	1			2
Ridley's Pharmacy	30	2			1
*City Drug Store	20	1			2
*Manhattan Confectionery	40	2			2
*Public Drug Store	30	2			4
The Rouse Drug Co.	30	2			6
*Rouse Drug Co. No. 2	25	3			4
Rice Annex Drug Store	25	5			3
Pappas Bros. Confectionery	30	6			10
Burgheim's Phar.	25	2			4
*Hendrix Phar.	20	1			2
*Grasse Drug Co.	35	1			2
Spears Drug Store	25	1			1
*Magnolia Phar.	25	1			2
*Cockrell's Phar.	25	2			3
*Post Office Pharmacy	35	4			2

		hr.	min.	CC	D	K
	*Wicks & Co.	30	2			8
	Olympia Candy Kitchen	30	5			12
	Clay & Gilpin	25	1			2
	*Griffin's Pharmacy	20	1			1
	*Keisling Pharmacy	30	3	1		5
	*Cockrell's Pharmacy	25	1			2
San Antonio	Milburn Bros. Pharmacy	35	2			5
	*Busy Bee Candy Kitchen	25	2	1		5
	Summers Drug Store No. 1	25	3			4
	Summers Drug Store No. 2	25	1	2		3
	*Whisenant Drug Co.	20	6			4
	Burns Drug Store	30	2			4
	*Pfeiffer's Cut-Rate Drug Store	25	2	1		2
	*George Keen's Drug Store	30	5			4
	*Twentieth Century Drug Store	30	0	1		1
	*Kalteyer & Sons	35	1			1
	Taliaferro's Phar.	20	2			3
	*Marshall Johnson's Phar.	30	1			1
	Chapin's Phar.	15	1			1
	Dreiss Drug Store	30	2	1		2
	*Quillian Confectionery	25	4	1		3
	*Palace of Sweets	25	1			1
	Wagner Pharmacy	25	5			3
	*Kalteyer's Pharm.	25	2			2
	*Fisher's Drug Store	30	1			3
	Crutcher-Threadgill Phar.	30	1			1
New Braunfels	*Ritcher's Phar.	30	1			1
	Sippel's Confectionery	45	1			3
	Walter Sippel's Confectionery	30	1			3
845 San Marcos	Story's Confectionery	50	2			2
	Vinson's Pharm.	25	1			2
	McIntyre's Confectionery	30	2			3
Austin	*Van Duris Confectionery	30	2			4
	*Gates & Cornwell Drug Store	35	1			3
	Crescent Confectionery	30	2			5
	Griffith Drug Co.	30	3			4
	Van Smith's Phar.	35	4			6
	*Johnson's Phar.	25	1			2
	Jeff. S. Wimbish Phar.	25	1			1
Taylor	Lyle's Phar.	45	1			2
	*Metropole Confectionery	35	2			2
	Friend's Palace	30	3			3
	*Dalliet's Phar.	30	1			2
Temple	Olympia Confectionery	35	3			6
	Mississippi Dept. Store	45	5			8
	*Power's Drug Store	25	1			2
	*Square Drug Store	25	2			2
	*Zacharias Confectionery	30	5			3
	Willis & McLean	25	2			2
	G. L. Reynolds Drug Store	40	4			7
Belton	Melot Bros.	30	2			4
	Olympia Candy Kitchen	30	2			5
	Head Drug Co.	40	2			2
Ennis	*Castellaw Drug Co.	25	2			4
	*John L. Stevenson Drug Store	20	2			1
	*Ennis Drug Co.	35	2			2
	*Glover & Guthrie Drug Co.	25	1			3
	Hesser's Phar.	25	2			4
	*Cunningham's Confectionery	30	1	1		2

		hr. min.	CC	D	K
Corsicana	Commercial Drug Store	25	2		2
	Owen Matthews Drug Store	35	1		3
	Harper & Inabnit	30	2		3
	Lawson Colson's Drug Store	30	1		3
	Beaton & Bagby	30	1		2
	*John Merchison	25	2		2
	Fifth Avenue Confectionery	25	1		3

846 At the fountains at the following places, during the time specified, in the presence of the witness, every person using the word "Koke" or "Dope" in ordering was asked by the dispenser what he meant and in each instance the answer was "Coca-Cola."

The first column indicates the page of the record. The second the name of the town. The third the name of the store. The fourth the name of the dispenser. The fifth the length of time during which the test was conducted. The sixth the number of persons calling for "Dope." The seventh the number of persons calling for "Koke" observed.

		Dispenser	hr. min.	D	K
847	Macon, Ga.	Saunders Drug Co.	Spencer Phillips	7 30	30
	Gainesville	Piedmont Drug Co.	Jones	4 30	15
	Royston	Ridgeway Drug Co.	Bennett	4	11
	Athens	Poss' Place	Smith	5 30	33
	Elberton	Herndon's Drug Store	Maxwell	3 30	16
	Madison	Atkinson Drug Co.	Atkinson	4 30	8
	Greensboro	Rice Drug Co.	Crumley	4 30	10
	Washington	Moore Bros.	Corry	4 30	9
	Thomson	Gibson Drug Co.	Johnson	3 30	10
	Warrenton	Baker's Soft Drink Stand	Mangriner, Jr.	3	8
	Milledgeville	Ennis Drug Co.	Benford	4	14
	McDonough	Horton Drug Co.	Elliot	3	8
	Jackson	Woods & Carmichael Drug Co.	Maddox & Furlow	3	14
	Flovilla	A. F. White Drug Co.	Harding	3 30	15
	Monticello	Jordan Drug Co.	Robinson	3 30	11
	Eatonton	Belvin's Drug Store	Wheeler	2 30	14
	Montezuma	Walker Drug Co.	Walker	3 30	22
	Americus	Hook's Drug Store	Wheeler	4 30	18
	Dawson	Dawson Drug Co.	McDowell	3	9
	Cuthbert	Zuber's Soft Drink Stand	McDaniel	3	14
	Albany	Bell Drug Co.	McDaniel	4	24
	Ashburn	Ashburn Drug Co.	Fairecloth	3 30	17
	Tipton	Brooks Drug Store	Thrasher	3	12
	Moultrie, Ga.	Hawkins Drug Store	Powell	3	17
	Douglas	Union Pharmacy	Coleman	3	12
	Fitzgerald	Adams Candy Kitchen	Adams	3	15

		Dispenser	hr.	min.	D	K
Ocilla	Ocilla Pharmacy	Smith	4		12	
Cordele	Stead's Drug Store	Hughes	3	20	15	
Ft. Gaines	John Brown's Place	Graham	4		30	
Bainbridge	Mills Drug Store	Welch	3	30	20	
Adel	Adel Drug Co.	Gunn	3		11	
Thomasville	Ingram Drug Co.	Pate	4		24	
Pelham	Consolidated Drug Co.	Mitchell	3	35	17	
Camilla	Stripling's Pharm.	Stripling	3		14	
Quitman	Horn Drug Co.	Dobbs	2	45	12	
Valdosta	Bergstrom & Newberg	Pope	3		18	
Waycross	Cherokee Pharmacy	Sutton	3		14	
Dallas, Texas	Southland Pharmacy	Arrant	6			60
Dallas	St. George Drug Store	McCarty & White	4	15		21
Dallas	Cecil V. Rogers Drug Store	Asbell	4			32
Houston	Rouse Drug Co.	Clark	4			30
Houston	Public Drug Co.	Dent & Englands	3	25		18
Houston	Wicks & Co.	Grenillon	3	30		23
Houston	Keisling Pharmacy	Johnson	3			20
Houston	J. H. Wood's Drug Store	Turner	3	45		15
San Antonio	Summers Drug Co. No. 1	Walker	4		3	42
San Antonio	Quillian Confectionery	Quillian	3			28
San Antonio	Whisenant Drug Co.	Barr	3	10		21
San Antonio	Wagner Drug Store	Sample	3			29
San Antonio	Taliaferro Drug Store	Thurman	3			14
San Antonio	Pfeiffer's Pharmacy	Brass & Pitman	3	30	3	8
Austin	Crescent Confectionery	George	3	30	2	18
Taylor	Dalliet's Pharmacy	Wassinger	4			16
Temple	Willis & McLean	Otto	2	30		17
Fnnis	Glover & Guthrie Drug Co.	Rogers	3		1	8
Corsicana	Owen Matthews Drug Store	Croft	2			10
Corsicana	Harper & Inabnit	Martin	2		1	12
Corsicana	Harper & Inabnit	Martin	2			12
Corsicana	Lawson Colson's Drug Store	Griffin	2			17

849 Friend visited 71 towns, heard 997 calls for "Coca-Cola," 533 calls for "Koke," 987 calls for "Dope." Persons calling for "Dope" and "Koke" were served with a drink made from syrup drawn from the same container as those asking for "Coca-Cola."

692 persons asking for "Dope" and 438 for "Koke" were questioned as to what they meant and each replied "Coca-Cola."

FREDERICK CONWAY PEACE. (Rec., 683.)

Towns visited: Hattiesburg, Miss., Biloxi, Miss., Bay St. Louis, Miss., Collins, Miss., Poplarville, La., Ellisville, La., New Orleans, La., Denison, Texas, Sherman, Texas, Van Alstyne, Texas, McKinney, Texas, Cleburne, Texas, Fort Worth, Texas, Dallas, Texas, Oak Cliff, Texas, Arlington, Texas, Grand Prairie, Texas.

684 Peace at the soda fountains in the following places on separate occasions called for Coca-Cola, Koke and Dope and also observed customers using the same words. All were served with drinks made from syrup drawn from one and the same container. (*Indicates that the container was marked "Coca-Cola.")

685	City Drug Store	Hattiesburg, Miss.
	Yellow Pine Drug Store	Hattiesburg
	Fields Drug Co.	Hattiesburg
	Moore Grocery Store	Hattiesburg
	Capdau Drug Co.	New Orleans, La.
	Williams Pharmacy	New Orleans
	Katz & Besthoff	New Orleans
	W. L. Brown Pharmacy	New Orleans
	Peters Pharmacy	New Orleans
	Osenwald & Gross Drug Store	New Orleans
	Kirby Five Cent Store	New Orleans
	Economical Drug Co.	New Orleans
	Louisiana Candy Store	New Orleans
	Cusach's Drug Store	New Orleans
	Katz & Besthoff Store	New Orleans
686	Lopez Confectionery Co.	New Orleans
	F. O. Blaine's Restaurant	New Orleans
	Frank L. Simmons Pharmacy	New Orleans
	Philadelphia Ice Cream Co.	New Orleans
	Power Drug Store	Bay St. Louis, Miss.
	J. A. D'Aquin Drug Co.	Biloxi
	Rush-Grayson Drug Co.	Biloxi
	W. L. Grant Pharmacy	Biloxi
	Porter Pharmacy	Biloxi
	Biloxi News Stand	Biloxi
	Scranton Pharmacy	Pascagoula
	Moore Grocery Store	Pascagoula
	A. E. Voyodzis	Pascagoula
	Pascagoula Pool Room	Pascagoula
	John H. Hill Confectionery Store	Moss Point
	Burnham's Pharmacy	Moss Point
	Southern Paper Co.	Moss Point
	Parlor's Drug Store	Gulf Port
	Day Drug Co.	Gulf Port

	Jones Bros. Drug Store	Gulf Port
	George Lambrakeo's Soda Fountain	Gulf Port
	Stratakos	Gulf Port
	The Imperial Palm Parlor	Gulf Port
	City Drug Store	Lumberton
	T. H. Redmond	Lumberton
	C. Polato Grocery Store	Lumberton
	Poplarville Drug Store	Poplarville
	Collins' Restaurant	Poplarville
	J. W. Bradshaw Grocery Store	Poplarville
	Barry Drug Co.	Columbia
	Barry Bros. Drug Store	Columbia
	Columbia Drug Store	Columbia
687	Walker Bros. Drug Store	Columbia
	Collins' Drug Store	Collins
	Stovall Drug Co.	Collins
	Jones Beacham Restaurant	Collins
	Scott's Restaurant	Hattiesburg
	M. W. Hyde Drug Co.	Ellisville
	E. J. Ward's Pharmacy	Ellisville
	Sam Imbragnlie's	Ellisville
	C. A. Abbey & Son's Grocery Store	Ellisville
	City Drug Store	Laurel
	Hattiesburg Drug Co.	Laurel
	Century Drug Store	Laurel
	Scruggs' Drug Store	Laurel
	T. J. Wallace Drug Co.	Laurel
	Pastime Pool Room	Laurel
	Waldrop's Pharmacy	Meridian
	Renfroe Pharmacy	Meridian
	Ware & Kendall's Pharmacy	Meridian
	C. J. Woodruff Drug Co.	Meridian
	McCorkle Drug Co.	Meridian
	Paragon Pharmacy	Meridian
	Coleman's Pharmacy	Meridian
	Sugerman's Cigar Store	Meridian
	C. Camarinos	Sherman, Tex.
	Palace of Sweets	Sherman
	Carl R. Noll Drug Co.	Sherman
	Craycroft & Stinson	Sherman
	Langford & Keith Drug Store	Sherman
	Watson's	Sherman
	Turner's Pharmacy	Sherman
	W. L. Bidding Drug Co.	Sherman
688	People's Pharmacy	Dennison
	Kingston Drug Co	Dennison
	Frank Maniolas	Dennison
	Reynolds Drug Co.	Dennison
	Cross' Drug Co.	Dennison
	Tony's Palm Garden	Dennison
	Tango	Van Alstyne
	Brown-Baker Drug Store	Van Alstyne
	J. J. Pitts Soda Fountain	Van Alstyne
	City Drug Store	Van Alstyne
	Hughes Restaurant	Van Alstyne
	Alcove Confectionery	McKinney
	Olympia Confectionery Store	McKinney
	Mitchell Drug Store	McKinney
	Smith's Drug Store	McKinney
	Dearmore & Hughes	Van Alstyne

	Hanner Drug Co.	Dennison
	The Tango	Dennison
	Schrodt's Pharmacy	Dallas
	C. R. Smith's Pharmacy	Dallas
	Empire Drug Co.	Dallas
	Palace Drug Store	Dallas
	Oriental Drug Store	Dallas
	T. J. Britton's Pharmacy	Dallas
	Tyler Avenue Pharmacy	Dallas
	Davis Confectionery Store	Dallas
	Bishop Avenue Pharmacy	Dallas
	Crystal Pharmacy	Dallas
	Mallory Drug Store	Dallas
	Titche & Goettinger	Dallas
	Haskell Pharmacy	Dallas
	Blain Marshall Drug Store	Dallas
	Washington Ave. Pharmacy	Dallas
689	Kirby & Blakeney's	Dallas
	Flagg Floral & Confectionery Store	Dallas
	North Dallas Drug Co.	Dallas
	Fairmount Pharmacy	Dallas
	Oak Cliff Pharmacy	Dallas
	Gallett & Compton's Drug Store	Dallas
	McKinney Avenue Drug Store	Dallas
	Littlepage Pharmacy	Dallas
	Highland Park Pharmacy	Dallas
	Magnolia Pharmacy	Dallas
	New York Ice Cream Parlor	Dallas
	Gilliland Pharmacy	Dallas
	Oak Lawn Market & Bakery	Dallas
	Thomas' Confectionery Store	Dallas
	Farrow Linder Phar.	Dallas
	Harper Confectionery Store	Grand Prairie
	Cooper Drug Store	Grand Prairie
	City Drug Store	Grand Prairie
	Harry Harris Drug Co.	Cleburne
	Foster & Fain's Drug Store #2	Cleburne
	C. F. Humphreys	Cleburne
	E. J. Campsey Drug Store	Cleburne
	Foster & Fain's Drug Store #1	Cleburne
	G. E. Mechem	Cleburne
	Cyrus & Cyrus	Cleburne
	Crow & Walker's Drug Store	Cleburne
	M. C. Anderson, 700 Penn. Ave.	Fort Worth
	R. A. Anderson, 706 Main St.	Fort Worth
	Bessie Pharmacy, 1001 Bessie St.	Fort Worth
	Bradford Bros., 3200 F Avenue	Fort Worth
	J. P. Broshear, 1300 Main St.	Fort Worth
	Canton Pharmacy, 515 Main St.	Fort Worth
690	Casey's No. 1, 1314 Terrell St.	Fort Worth
	Casey's No. 2, 2338 Hemphill St.	Fort Worth
	Clardy's Drug Store, 1600 Vickery Blvd.	Fort Worth
	College Avenue Pharmacy, 1730 College St.	Fort Worth
	Corner Drug Store, 1215 Cahoun St.	Fort Worth
	Jack Coulson, 101 North Houston St.	Fort Worth
	Coney & Martin, 810 Main St.	Fort Worth
	Curby's Drug Store, 1407 Main St.	Fort Worth
	Dillin Bros., 300 S. Jennings St.	Fort Worth
	Evans Avenue Pharmacy, 915 Avans Ave.	Fort Worth
	Exchange Drug Store, 107 E. Exchange St.	Fort Worth
	Z. Gaither, 514 S. Main St.	Fort Worth
	George's Pharmacy, 1415 E. Front St.	Fort Worth

	Glenwood Pharmacy, 1421 Bessie St.	Fort Worth
	Grammar Pharmacy, 100 Main St.	Fort Worth
	Hickman & Clark, 1408 N. Main St.	Fort Worth
	Hightower & Harroll Drug Co., 1216 Peach St.,	Fort Worth
	Johnston Drug Co., 801 Houston St.	Fort Worth
	Jones Drug Company, 104 W. Exchange St.	Fort Worth
	Lackey's Pharmacy, 102 W. Front St.	Fort Worth
	R. T. Lee, 1230 Henderson St.	Fort Worth
	Jones Drug Store, 900 Evans St.	Fort Worth
	Lowes Drug Store, 11th & Jennings Sts.	Fort Worth
	Metropolitan, Main St.	Fort Worth
	Magnolia Drug Co., 1231 Hemphill St.	Fort Worth
	R. E. Martin, No. 1, 215 S. Main St.	Fort Worth
	Martin, No. 2, 2001 Vickery Blvd.	Fort Worth
	Model Pharmacy, 1101 College St.	Fort Worth
691	North Fort Worth Drug Co., 101 W. Exchange St.	Fort Worth
	Nowlins Pharmacy, 400 N. Wheeler St.	Fort Worth
	Owl Drug Company, 1312 N. Main St.	Fort Worth
	Pangburns Drug Store, 501 Houston St.	Fort Worth
	Pools Drug Store, 1200 First St.	Fort Worth
	Puckett Drug Co., 1564 W. Magnolia St.	Fort Worth
	Rafferty, F. L., 400 W. Bois d'Arc	Fort Worth
	Rattan Pharmacy, 211 E. 15th St.	Fort Worth
	Reeves Pharmacy, 12th & Jennings Sts.	Fort Worth
	Renfroe Pharmacy, 11th & Main Sts.	Fort Worth
	Renfroe Drug Company, 315 Main St.	Fort Worth
	E. T. Renfroe & Co., 915 Houston St.	Fort Worth
	Renfroe Drug Store, 715 Main St.	Fort Worth
	Smythe Drug Co., 2407 N. Main St.	Fort Worth
	F. J. Stangl Drug Co., 1300 Hemphill St.	Fort Worth
	Temple Drug Company, 403 E. 9th St.	Fort Worth
	10th Ward Drug Co., 2263 Hemphill St.	Fort Worth
	Walkup Drug Co., 1610 Main St.	Fort Worth
	M. D. Wallace, 321 N. Elm St.	Fort Worth
	Webb's Drug Store, 200 Main St.	Fort Worth
	Wilson's Drug Store, 1514-A Main St.	Fort Worth
	Wofford-Powers Drug Co., 813-15 Houston St.	Fort Worth
	Belknap Drug Co., 201 E. Belknap St.	Fort Worth
	Hassell's Drug Co., 504 Main St.	Fort Worth
	J. H. Boord, 1265 Evans St.	Fort Worth
	Montcastle Drug Co., 1231 S. Main St.	Fort Worth
	Transfer Drug Co., 1218 Houston St.	Fort Worth
	Twentieth Ward, 200 N. Main St.	Fort Worth
692	Booth Bros., 807 Houston St.	Fort Worth
	Duehich & Co., 609 Houston St.	Fort Worth
	H. B. Jones Con. Co., 101 Main St.	Fort Worth
	L. M. Mitchell & Co., 911 Main St.	Fort Worth
	Royal Con. Co., 1012 Main St.	Fort Worth
	Tupolis Confectionery Co., 1112 Main St.	Fort Worth
	Lake Como, Lake Como St.	Fort Worth
	Joseph Rocugno Confectionery, 1510 Main St.	Fort Worth
	P. G. Chopmond, S. Jennings St.	Fort Worth
	Kelly Bros., 128 Jennings St.	Fort Worth
	Union Depot Fountain, Union Depot	Fort Worth
	J. E. Brenner, 204 Main St.	Fort Worth
	Club Confectionery, 1600 Back E. Front St.	Fort Worth
	Palace Drug Store	Arlington
	Rexall Drug Store	Arlington
	Corner Drug Store	Arlington

692 The following proprietors or dispensers were interviewed and stated to the witness that Koke and Dope are used by the public as nicknames for Coca-Cola:

693	Ames, Mgr.	City Drug Store	Hattiesburg, Miss.
	Jones, Prop.	Yellow Pine Drug Store	Hattiesburg
	Fields, Prop.	Fields' Drug Store	Hattiesburg
	Edwardson, Prop.	Moore Grocery Store	Hattiesburg
	Capdau, Prop.	Capdau Drug Co.	New Orleans, La.
	Flowers, Dispenser		
	A. A. Kaczovoski, Mgr.	Williams Pharmacy	New Orleans
	Evan Douch, Dispenser		
	F. E. Suter, Mgr.	Katz & Besthoff	New Orleans
	W. L. Brown, Prop.	W. L. Brown Pharmacy	New Orleans
	Charles T. Peters	Peters Pharmacy	New Orleans
	Savaghier, Mgr.	Osenwald & Gross Drug Store	
	F. S. Dean, Mgr.	Kirby Five Cent Store	New Orleans
	George F. Moss, Mgr.	Economical Drug Co.	New Orleans
	J. C. Capdenax, Prop.	Louisiana Candy Store	New Orleans
	A. B. Friel, Mgr.	Cusach's Drug Store	New Orleans
694	FredSchwartzenburg, Mgr	Katz & Besthoff	New Orleans
	Lopez Confectioner Co.		New Orleans
	P. O. Blane, Prop.	P. O. Blane's Restaurant	New Orleans
	H. S. W. Code, Mgr.	Frank L. Simmons, Pharmacy	New Orleans
	William Rappold, Mgr.	Philadelphia Ice Cream Co.	New Orleans
	L. N. Power, Prop.	Power Drug Store:	Bay St. Louis, Miss
	Chris. Gibbon, dispenser.		
	J. A. D'Aquin, Mgr. and Prop.	J. A. D'Quin Drug Co.	Biloxi
	J. Morris & Catshot, dispensers.		
	Dr. Rush, Prop.	Rush-Grayson Drug Co.	Biloxi
	Grant.	W. L. Grant Pharmacy	Biloxi
	Joseph L. Brenners, Disp.	Porter Pharmacy	Biloxi
	E. Berkley	Biloxi News stand	Biloxi
	Dr. McBay Young, Prop.	Seranton Pharmacy	Pascagoula
	Moore, Mgr.	Moore Grocery Store	Pascagoula
	A. E. Voyodzis, Prop.	A. E. Voyozsis	Pascagoula
	Mike Nomane, Prop.	Pascagoula Pool Room	Pascagoula
	John H. Hill, Prop.	John H. Hill Confectionery Store	Moss Point
	Mr. Burnham	Burnham Pharmacy	Moss Point
	Dr. Sharp, Mgr.	Southern Paper Co.	Moss Point
	J. W. Culver, Mgr.	Parlor's Drug Store	Gulf Port
	J. O. Baker and Lewis	Mossino, dispensers	
	Mr. Day, Prop.	Day Drug Co.	Gulf Port
	Dr. H. H. Jones, Mgr.	Jones Bros. Drug Store	Gulf Port
695	George Lambralesev's Soda	Fountain	Gulf Port
	Lewis Stratakos	Lewis Stratakos	Gulf Port
	W. K. Porter	The Imperial Palm Parlor	Gulf Port
	Dr. T. P. McInnis, Prop.	City Drug Store	Lumberton
	C. Polato	Grocery Store	Lumberton
	Dr. Fred W. Smith, Mgr.	Poplarville Drug Store	Poplarville
	Miss Kate Collins, Prop.	Collins' Restaurant	Poplarville
	Mrs. C. W. Cleghorn, dispenser.		
	J. W. Bradshaw	Grocery Store	Poplarville
	Columbia Drug Store		Columbia
	Barry Drug Co.		Columbia
	Dr. Harris, Mgr.	Barry Bros. Drug Store	Columbia
	Dr. Ratcliff Faraberry, dispenser.		
	Dr. G. H. Wells, Prop.	Walker Bros. Drug Store	Columbia
	O. S. Mayfield, Prop.	Collins Drug Store	Collins
	Dr. Stovall, Prop.	Stovall Drug Co.	Collins
	Mr. Jones	Jones Beacham Restaurant	Collins

	Mr. Scott	Scott's Restaurant	Hattiesburg
	Mr. Hyde	M. W. Hyde Drug Co.	Ellisville
	Dr. Ward	E. J. Ward's Pharmacy	Ellisville
	Sam Imbragnlic	Sam Imbragnlic	Ellisville
	Mr. Abbey	C. A. Abbey & Son	Ellisville
	City Drug Store,		Laurel
	G. W. Nicholson	Hattiesburg Drug Co.	Laurel
	W. S. Ames, Mgr.	Century Drug Store	Laurel
	W. H. Hill, dispenser.		
	Mr. Scruggs	Scrugg's drug store	Laurel
	Mr. Wallace	T. J. Wallace Drug Co.	Laurel
	L. Banker, Mgr.	Pastime Pool Room	Ellisville
696	J. B. Waldrop, Mgr.	Waldrop's Pharmacy	Meridian
	C. W. Harper, C. V.	Cooley and Roy Ray, dispensers	
	Mr. Renfro, Prop.	Renfro Pharmacy	Meridian
	J. C. Ware	Ware & Kendall's Pharmacy.	Meridian
	C. J. Woodruff, Prop.	C. J. Woodruff, Drug Co.	Meridian
	Mr. McCorkle, Prop.	McCorkle Drug Co.	Meridian
	Mr. Heiss, Mgr.	Paragon Pharmacy	Meridian
	E. P. Simmon, dispenser		
	Dr. Coleman	Coleman's Pharmacy	Meridian
	V. Knapp, Mgr.	Sugerman's Cigar Store	Meridian.
	Manager	C. Camarinos	Sherman, Texas
	Mr. Plea	Palace of Sweets	Sherman
	Mr. Noll, Prop.	Carl R. Noll Drug Co.	Sherman
	Mr. Stinson	Craycroft & Stinson	Sherman
	Manager	Langford & Keith's Drug Store	Sherman
	Mr. Watson	Watson's	Sherman
	Dr. Turner	Turner's Pharmacy	Sherman
	W. L. Bidding Drug Co.		Sherman
	Manager	People's Pharmacy	Dennison
	Mr. Kingston	Kingston Drug Co.	Dennison
	Dispenser	Frank Maniolas	Dennison
	Mr. Ramsey, Mgr.	Reynolds Drug Co.	Dennison
	Mr. Cross	Cross' Drug Co.	Dennison
	Tony Giarraputo	Tony's Palm Garden	Dennison
	S. G. Davis, Prop.	Tango	Van Alstyne
	Mr. Brown	Brown-Baker Drug Store	Van Alstyne
	J. J. Pitts, Prop.	J. J. Pitts Soda Fountain	Van Alstyne
	Oliver G. Daring	City Drug Store	Van Alstyne
697	Mr. Hughes, Prop.	Hughes Restaurant	Van Alstyne
	Messrs. Coffee, Props.	Alcove Confectionery	McKinney
	C. Camarinos, Prop.	Olympia Confectionery Store	McKinney
	Mr. Mitchell, Prop.	Mitchell Drug Store	McKinney
	Major Smith	Smith's Drug Store	McKinney
	Dr. Hanner	Hanner Drug Co.	Dennison
	C. H. Hughes	Dearmore & Hughes	Van Alstyne
	Mr. Schrodtt, Prop.	Schrodtt's Pharmacy	Dallas
	E. L. Day, dispenser.		
	C. R. Smith	C. R. Smith's Pharmacy	Dallas
	L. E. Kerr, Mgr.	Empire Drug Co.	Dallas
	Mr. Nosssett, B. W. Fuller	Palace Drug Store	Dallas
	dispensers.		
	R. C. Coppedge, Prop.	Oriental Drug Store	Dallas
	T. J. Britton, Prop.	T. J. Britton's Pharmacy	Dallas
	Jeff Britton, dispenser.		
	B. H. Anderson	Tyler Avenue Pharmacy	Dallas
	Mallory Drug Store		Dallas
	Lewis Davis, Prop.	Davis Confectionery Store	Dallas

	Mr. Littlepage	Bishop Avenue Pharmacy	Dallas
	Harris and Clark, Props.	Crystal Pharmacy	Dallas
	R. H. White, Mgr.	Titche & Goettinger	Dallas
	I. C. Guy	Haskell Pharmacy	Dallas
	Marshall	Blain Marshall Drug Store	Dallas
	Manager	Washington Avenue Phar.	Dallas
	Blackeney	Kirby & Blakeney	Dallas
	Mrs. E. C. Flagg	Flagg Floral & Confectionery Store	Dallas
698	B. C. Camp, Prop.	North Dallas Drug Co.	Dallas
	W. N. Craig	Fairmount Pharmacy	Dallas
	L. O. Donnelly, Mgr.	Oak Cliff Pharmacy	Dallas
	B. B. Brown, Clk.	Gallett & Compton's Drug Store	Dallas
	W. H. Gault, dispenser		
	F. L. Johnson, Mgr.	McKinney Avenue Drug Store	Dallas
	Ernest Dowdy, dispenser		
	T. H. Littlepage, Prop.	Littlepage Pharmacy	Dallas
	W. B. Dougherty, Prop.	Highland Park Pharmacy	Dallas
	J. A. Duncan	Magnolia Pharmacy	Dallas
	Dispenser	New York Ice Cream Parlor	Dallas
	Mr. Gilliland, Prop.	Gilliland Pharmacy	Dallas
	W. T. Coble, Prop.	Oak Lawn Market & Bakery	Dallas
	Mills, Mgr.	Thomas' Confectionery Store	Dallas
	J. E. Blackwell, Mgr.	Farrow-Linder Pharmacy	Dallas
	S. H. Browning and C. A. Reeves, dispensers		
	S. H. Alhoff, Prop.	Owl Drug Store	Dallas
	H. D. Harding, dispenser		
	Mr. & Mrs. Harper	Harper Confectionery Store	Grand Prairie
	Mr. Butcher	City Drug Store	Grand Prairie
	Johnson, Prop.	Cooper Drug Store	Grand Prairie
	Mr. Sykes, Mgr.		
	Harry Harris, Prop.	Harry Harris Drug Co.	Cleburne
	R. C. Johnson, dispenser		
	M. S. Ball, Mgr.	Foster & Fain's Drug Store #2	Cleburne
	G. C. Dorris and W. R. Dalton, dispensers		
699	C. F. Humphreys, Prop.	C. F. Humphreys	Cleburne
	J. M. Williams, dispenser		
	E. J. Campsey	E. J. Campsey Drug Store	Cleburne
	W. B. Featherstone, Jr., A. C. Featherstone		
	E. C. Reeves and	Foster & Fain's Drug Store	Cleburne
	William Binder, dispensers #1		
	F. B. Guard, dispenser	G. E. Mecham	Cleburne
	R. P. Cyrus	Cyrus & Cyrus	Cleburne
	Dr. C. R. Walker	Crow & Walker's Drug Store	Cleburne
	C. D. Williams	Palace Drug Store	Arlington
	Jim Rose	Corner Drug Store	Arlington

At the fountains at the following places, during the time specified, in the presence of the witness, every person using the word Koke or Dope in ordering was asked by the dispenser what he meant and in each instance the answer was Coca-Cola. The first column gives the page of the record. The second the town, the third the name of

the store, the fourth the time during which the test was made, the fifth the number of calls for Coca-Cola, the sixth the number of calls for Koke, the seventh the number of calls for Dope.

				CC	K	D
700	New Orleans, La.	Capdau Drug Co.	8 a. m. to 10 p. m.	113	3	8
	New Orleans, La.	W. L. Brown Co.	all day	38	7	8
	New Orleans, La.	Peters Pharmacy	9 a. m. to 7 p. m.	21		3
	Bay St. Louis, Miss.	Power Drug Store	all day	38		18
	Biloxi, Miss.	J. A. D'Aquin Drug Co.	all day	19	6	28
	Gulf Port, Miss.	Parlor's Drug Store	8.30-8 p. m.	35	1	101
	Columbia, Miss.	Barry Bros. Drug Store	4.40 p. m. 9.30 p. m.	11		23
	Laurel, Miss.	Century Drug Store	8.20 a. m. 12 m.	24		33
	Laurel, Miss.	Serugg's Drug Store	2 hrs.	11		9
	Meridian, Miss.	Waldrop's Pharmacy	8 a. m.-7.30 p. m.	105		215
	Sherman, Texas	Carl R. Noll		7	36	
	Dennison, Texas	C. D. Kingston's Drug Store	2.30 p.m. 8 p.m.	11	41	
	Dallas, Texas	Oriental Drug Co.	10 a.m.-5 p.m.	9	47	
	Dallas, Texas	Palace Drug Store	7 p.m.-10 p.m.	5	14	
	Dallas, Texas	Schrodt's Drug Store	7.25 a.m.-8.30 a.m.	5	9	1
	Dallas, Texas	Britton's Phar.	8.45-11.15 a.m.	14	28	3
	Dallas, Texas	Thomas' Confectionery Store	8.15 a.m.-12 m.	22	40	
	Dallas, Texas	Olympia Confectionery Store	1.15-5.50 p.m.	22	17	
	Dallas, Texas	Farrow-Linder Phar.	7.10 to 10.25 p.m.	9	9	
	Dallas, Texas	Owl Drug Store	7.30 to 11.35 a.m.	9	28	

T. M. MURPHY (Rec., 498):

499 Towns visited: Summerset, Ky., Lexington, Ky., Louisville, Ky., Bowling Green, Ky., Owensboro, Ky., Helena, Ark., Little Rock, Ark., Texarkana, Ark., Camden, Ark., Pine Bluff, Ark., Brinkley, Ark., Newport, Ark., Walnut Ridge, Ark., and Pocahontas, Ark., Poplar Bluff, Mo., Sykeston, Mo., and Cape Girardeau, Mo.

501 At the following places, the witness on separate occasions, called for Coca-Cola, Koke and Dope. In every case the syrup was drawn from the same container.

	Town	Store
499	Summerset, Ky.	Kelsey Drug Co.
	Summerset	Palace of Sweets
	Lexington	C. A. Johns Drug Store
	Lexington	Smith's Drug Store
	Lexington	Jones Drug Co.
	Lexington	McAdams & Morford, Druggists
	Lexington	Thompson Drug Co.
	Lexington	Lexington Drug Co.
	Lexington	William Stagg, Druggist
	Louisville	Burmyers Brothers
	Louisville	Southern Catering Co.
	Louisville	T. P. Taylor & Co.
	Louisville	Newman Drug Co.
	Louisville	J. B. Baird, Druggist
	Louisville	H. O. Hurley, Druggist
	Louisville	Kline & Sons, Confectionery
	Bowling Green	Callis Brothers
	Bowling Green	J. E. Tyler
500	Owensboro	Weldon Drug Co.
	Owensboro	Public Drug Co.
	Owensboro	Readman's Pharmacy
	Helena, Ark.	Myers Drug Co.
	Helena	Palace Drug Co.
	Helena	Govan-King Drug Co.
	Little Rock	Snodgrass-Bray Drug Co.
	Little Rock	Read-Stahei Drug Co.
	Little Rock	State Drug Store
	Little Rock	Pittman Drug Co.
	Little Rock	Perins Drug Co.
	Texarkana	Evanson Drug Co.
	Texarkana	Boyd Drug Co.
	Camden	Arthur Levy, Druggist
	Camden	Morgan Drug Co.
	Pine Bluff	Seal's Pharmacy
	Pine Bluff	Rosenburg's Pharmacy
	Pine Bluff	Bedell's Pharmacy
	Brinkley	Dutton Drug Co.
	Brinkley	W. K. Sims Drug Co.
	Newport	Bevans Drug Co.
	Newport	Walker Drug Co.
	Walnut Ridge	Moses Cooper's Place
	Walnut Ridge	Bob Cooper's
	Pocahontas	Brinkley Drug Co.
	Pocahontas	Layman Drug Co.
	Pocahontas	Palace Drug Co.
	Poplar Bluff, Mo.	Patton & Farr Pharmacy
	Poplar Bluff	Gliddens Candy Kitchen
	Sykeston, Mo.	J. A. Poindexter
	Sykeston	Derris Drug Store
	Cape Girardeau	St. Charles Pharmacy
	Cape Girardeau	Dalton Drug Co.
	Cape Girardeau	A. B. Miller's Confectionery & Drug Co.

Witness then interviewed the proprietor or dispenser at each of the above listed places who stated that Koke and Dope meant Coca-Cola.

This witness' testimony can be summarized as follows:

Number of towns visited, 77; number of proprietors, managers and dispensers interviewed, 102; number of consumers' tests made, 26.

In these consumers' tests there were 519 calls for Coca-Cola, 98 calls for Dope and 302 calls for Koke. In every instance the syrup to make the drinks called for, as Coca-Cola, Koke and Dope was taken from one and the same container.

Each consumer who used the words "Koke" or "Dope," was by the dispenser, in the presence and hearing of the witness, asked what he meant, the reply invariably was Coca-Cola.

SCHEDULE III.

That the red color of the Coca-Cola barrel is distinctive and a means by which Coca-Cola is identified is clear from the testimony. The following are extracts from the record which establish this fact:

F. L. SKILLEN (Rec., 792), druggist, Dallas, Texas:

- 794 "We took over the Browder Pharmacy from the U. S. Court. Yes, sir; we found among the assets what we supposed was 'Coca-Cola.' There was a barrel which we supposed was 'Coca-Cola' and I inquired of the sodaman if he had any 'Coca-Cola' on hand and he said, yes, about ten or fifteen gallons. I passed in the back room and saw a red barrel sitting there and passed on out and we served all of that. Yes, sir; we served it as 'Coca-Cola.' You ask what made me think it was 'Coca-Cola'; why, I suppose it was innocence more than anything else, we don't serve anything else but 'Coca-Cola' and didn't suppose anybody else did. I asked him did he have any 'Coca-Cola' on hand and he said yes. You ask if the color had anything to do with it; yes, it was red and I supposed it was 'Coca-Cola.' You again ask if the color of the barrel had anything to do with it; yes, the color was the 'Coca-Cola' color. When that was sold and we ordered a barrel of 'Coca-Cola' delivered to us to the store the salesman from the jobbers said they hadn't been handling 'Coca-Cola' over there and
- 795 then I told him it must not have been 'Coca-Cola' that we had and then I asked the sodaman about it and he said it was not; and we had an employee at that time, who had formerly been with Mr. Browder, by the name of Mr. Sam Weir, and I asked Sam if that was 'Coca-Cola' and he said, 'No.' * * * I took over that store April

11th, I believe, 1912. The conclusion that we arrived at was that it was a store that had been selling 'Koke.'

799 * * * You ask if I got any complaints from the drinkers at the fountain that it was not 'Coca-Cola'; it is so far back that if there had been any complaints I wouldn't have known anything about it, but I sold it laboring under the impression that it was 'Coca-Cola.' * * * I couldn't say how it differed from the 'Coca-Cola' barrel. I never saw the barrel but once and I just glanced at it. Yes, sir; I have seen other 'Coca-Cola' barrels and I didn't notice any distinction between this barrel and other 'Coca-Cola' barrels, it was painted red."

GEORGE ALFRED HARBOUR (Rec., 456), Atlanta, Georgia; proprietor of Harbour's Smoke House; been conducting a soda fountain five years and a half:

458 " 'Coca-Cola' kegs have an individuality about them that is easily distinguishable from any other drink, anything that I have ever bought, and when I see them setting out there on the street I know it is a 'Coca-Cola' keg."

I. L. JAMES (Rec., 460), Atlanta, Georgia; drug business:

460 "No, if I should order 'Coca-Cola' and a white barrel should be shipped to my place I would not think it was 'Coca-Cola.' "

ALEXANDER CRUICKSHANK (Rec., 463), Atlanta, Ga.; cigars and soda water, five stores:

464 "I can mighty near tell a 'Coca-Cola' keg when I see it. I can sight one on the wagon; I know it is 'Coca-Cola.' The thing about a 'Coca-Cola' keg that indicates to me that it is a 'Coca-Cola' keg, is the color of the keg."

DAVID G. WISE (Rec., 474), Atlanta, Ga., for five years;
keeps two retail stores:

- 475 "If I were to order 'Coca-Cola' and it came to me in a barrel painted white instead of red my porter would likely call my attention to it and say 'Doctor, this ain't right, something wrong about this.' "

CECIL V. ROGERS (Rec., 735), druggist, Dallas, Texas; has
been in drug business for about twenty-three or twenty-four years:

- 738 "If I were walking down the street and saw in front of a store where there was a soda fountain, a pile of red barrels and assuming that I was far enough off so that I could not see the labels, I would decide it was a 'Coca-Cola' barrel. I am familiar with the color; I have handled quite a number in my time and I have always received it in red barrels and I have never seen it in any other colored barrel."

J. B. PRENDERGRAST (Rec., 496), druggist, Atlanta, Ga., testified:

- 497 "If I saw a cartload of kegs going down the street, some red and some white, I would naturally think of 'Coca-Cola' being a red keg."

W. A. HARTMAN (Rec., 492), 173 Ashby street, Atlanta, Ga.; cigar and soda water business:

"You ask how I could distinguish a keg of 'Coca-Cola' by its appearance; I could distinguish it by the color of it. No, sir, I have never seen it in anything else except red kegs or barrels. If I should see a line of red kegs or barrels in front of a soda fountain what would flash

immediately in my mind would be that they are 'Coca-Cola' kegs."

CHARLES KINGSBERRY (Rec., 465), Atlanta, Ga.; cigar and soda water business:

"Q. 23. You know it when you see it by the color it has? A. By the color; yes, sir. Q. 24. That is one of the ways? A. Yes, sir, that is one of the ways that I know it, and the name, another way. If I should see in front of a soda water stand a whole lot of barrels and kegs of red color, the first thing that would flash through my mind would be that it was 'Coca-Cola.' Yes, sir; that would be so whether I saw the label or not, because they have been putting it out in red kegs ever since I have been getting it from them."

R. K. SMITH (Rec., 1190), first soda clerk with the United Cigar Stores Co., Nashville, Tenn., a witness called by the Koke Companies admitted:

"I could tell a Coca-Cola barrel if it was labeled Coca-Cola. If it was not labeled possibly I would think it was a Coca-Cola barrel because they are red barrels."

The following is a tabulation of other testimony which shows that the color of the Coca-Cola barrels is a distinctive red, and that this color aids purchasers and consumers in ascertaining that a barrel does or does not contain Coca-Cola. One of the steps of infringement by the Koke Companies is the imitation of these distinctive barrels. That the Koke Companies get up their barrels in exact imitation of the Coca-Cola barrels, and buy used Coca-Cola barrels is admitted.

	Record Page.
S. C. Dobbs	319, 320 & 321
F. M. Robinson	357
C. H. Candler	395, 396
I. V. Wood	569
M. D. Palmer (Paint for Koke Co.)	577, 578
D. P. English	802
Frank P. Killilea	678, 679
W. J. Cheevers	588 <i>et seq.</i>
Nick D. Chotas	448
F. W. Green	451
I. L. James	460
F. F. Langenfeldt	473
J. F. Redding	479
W. A. Medlock	483
Clyde Park	513
See, also, the stipulation entered into in this case concerning the testimony of:	
C. Stanley French	856, 857
Edward T. Longstreth	856, 857

SCHEDULE IV.**THE DISTINCTIVE COLOR AND TASTE OF
COCA-COLA.**

The record shows that Coca-Cola has been the same color since it was first manufactured. That this color is produced by the use of caramel, or burnt sugar. The amount of caramel used in Coca-Cola is minute and its use is not structural, but for a decorative and identifying purpose. That is to say, that it does not produce any part of the flavor of the product, but is used to give it the color that the product has.

It was further shown by a number of witnesses that color is one of the methods of ascertaining and determining from observation if a product is Coca-Cola or not.

The following witnesses so testified:

Name of Witness.	Record Page.
S. C. Dobbs	319, 320
C. H. Candler	395
W. P. Heath	415, 417
Nick D. Chotas	448
F. W. Green	451
Charles Kingsberry	467
Charles E. Caspari	901

It is clear from the record that Coca-Cola as a beverage is identified by its distinctive color.

I. L. JAMES (Rec., 460), Atlanta, Ga., drug business:

“No, if I should order a ‘Coca-Cola’ at a soda fountain and they should give me a yellow drink I would not think it was ‘Coca-Cola.’ ”

GEORGE ALFRED HARBOUR (Rec., 456), Atlanta, Georgia, proprietor of Harbour's Smoke House; has conducted a soda fountain five years and a half:

458 "No, sir, I cannot serve to my customers asking for 'Coca-Cola,' either by it's name, or by any of its nick-names, a golden yellow beverage because they would know it was not 'Coca-Cola' by its color."

It is admitted by the testimony of a number of witnesses produced by the Koke Companies that caramel in a product of this character is used purely for coloring; that it is not an essential part of the product, and even if caramel is used there is no necessity for the exact duplication of the shade of Coca-Cola; that different quantities of caramel give different colors, and that by the use of different quantities any shade from a pale straw color to practically a black can be obtained. Upon this admitted fact is based the argument of the Coca-Cola Company that the exact duplication of Coca-Cola in color of the Koke Companies' product is unnecessary.

R. K. SMITH (Rec., 1190) (a witness called by the Koke Companies), first soda clerk, with United Cigar Stores Co., Nashville, Tenn., testified:

"The color depends upon the amount of caramel you use. You can make a different drink, take a white drink and add caramel coloring and you can get anywhere from a pale yellow to a black."

J. D. Fletcher, a manufacturer (Rec., 1091, 1094), testified that he uses caramel simply for coloring.

J. A. Bermudez (Rec., 1498) testified that caramel gives body and appearance. By using different amounts of caramel, different shades can be obtained; that Koke, with or without caramel, would not be changed in taste; that the purpose of using caramel is to give color.

SCHEDULE V.

Salesmen of the Koke Companies in attempting to sell their product hold out as an inducement to purchase that more money can be made in its sale than in the sale of Coca-Cola and that it can be sold as and for Coca-Cola and the public cannot tell the difference. The testimony establishes beyond controversy that these representations are deliberately, continually and systematically made.

ROBERT CHIDSEY (Rec., 558), manager of the Etowah Company Soda Water and Ice Cream Parlor, 250 Dauphin street, Mobile, testified that he had a call from a representative of The Southern Koke Company, Limited, about three or four months ago:

- 559 "He proposed to sell me his syrup called 'Koke,' which he claimed was a good substitute for 'Coca-Cola' and that it could be sold for 'Coca-Cola,' and I stated to him that I didn't care to purchase this syrup to sell in place of 'Coca-Cola' and he thereupon figured up the difference in profit between 'Coca-Cola' and his stuff. Under his way of figuring it, his syrup cost me about fifty cents a gallon less than 'Coca-Cola.' * * * He sent me some stuff and told me I could serve it in the
- 560 place of 'Coca-Cola.' * * * I didn't know him before he called on me, and, without any preliminary knowledge of me or I of him, he opened the proposition for me to commit a fraud on the public by substituting his goods for 'Coca-Cola'—that's my testimony. You ask if that wouldn't have been an arrant fraud; well, he told me I was a little too conscientious about the matter. * * * He said I could sell 'Koke' in the place of 'Coca-Cola' and make more money out of it. He said I would get the same price for it as I did for 'Coca-Cola,'

but argued that if a man came along and called for 'Coca-Cola' I could serve him that, which would net me a greater profit than if I gave him genuine 'Coca-Cola.' Yes, sir; I still insist that his only object in seeing me
561 was to induce me to buy his syrup and sell to my customers instead of 'Coca-Cola.' * * * The reason why he sent me a gallon afterwards was because he told me I could try it and taste it and if I didn't think it was as good as 'Coca-Cola,' and it couldn't be served as 'Coca-Cola,' that I needn't bother about it any further."

E. R. ALBRIGHT, of Albright & Wood, druggists of Mobile, Ala., testified (Rec., 546):

546 That Patton, the representative of the Southern Koke Company, Ltd., called on him in November, 1913. Patton stated that the Southern Koke Company had the names "Dope" and "Koke" copyrighted; when people asked for "Dope," give them "Dope"; when they asked for "Koke," give them "Koke." " 'Dope' and 'Koke' were the same." Patton stated that it was unfair competition to sell "Coca-Cola" in response to requests for "Koke" and "Dope," and that dealers who served "Coca-Cola" for "Dope" would be liable for prosecution by the company Patton represented. The fact that "Koke" and "Dope" were nicknames for "Coca-Cola" was discussed. Albright stated that he always furnished "Coca-Cola" when people asked for "Dope." Speaking of Patton he said, "His argument was that
547 they had the names 'Dope' and 'Koke' copyrighted, and that a dealer who supplied 'Coca-Cola' for those articles when they asked for 'Dope' and 'Koke' would be liable to prosecution, that they owned that name the same as the Coca-Cola people did 'Coca-Cola.' "

Albright and Wood bought two barrels of the product of the Southern Koke Company, Ltd., stipulating that it

should be shipped unlabeled. The price was less than the price of "Coca-Cola." Thereafter, when people asked for a "Koke" or a "Dope," at Albright & Wood's fountain they were given the product of the Southern Koke Company. Albright testified:

"Why, I should say I have known the nicknames 'koke' and 'dope' to be applied to 'Coca-Cola' about eight years,—eight or ten years."

Albright & Wood did not want the Southern Koke Company stuff to be labeled.

"I didn't care for my customers to know that I was using the stuff at all."

He testified its sale in response to orders for "Koke" and "Dope" as follows:

"I didn't feel like I was violating any law, because I didn't serve it as 'Coca-Cola,' I served it as 'Dope.'"

He discontinued because:

548 "It was my own feeling in the matter. I didn't think I was doing right. I know that I drink 'Coca-Cola' and have for years, and did before I went in business on my own account, and when I went into a place and asked for 'Dope' I expected 'Coca-Cola.'"

* * * * *

550 RDQ 1. Mr. Albright, you said a few minutes ago, in answer to a cross-question that you didn't serve this product of the Koke Company of America for 'Coca-Cola,' the fact is, isn't it, that you didn't serve it to people who used the word 'Coca-Cola' in making their request? A. Exactly; yes, sir.

RDQ. 2. You did, however, serve it to people who used the words 'Koke' and 'Dope'? A. Yes, sir."

I. V. WOOD (Rec., 566), of the firm of Albright & Wood, druggists, of Mobile, testified that he had a conversation with a representative of the Southern Koke Company about twelve or fifteen months ago, who tried to get him to purchase some of the products of the Southern Koke Company:

- 567 “He claimed that ‘Koke’ and ‘Dope’—that they had the copyright name for it, and that it was their product, and if a man came in and asked for ‘Koke,’ or ‘Dope,’ why we had a right to sell their product, that they had a registered name for it, that was my impression, that
- 567 they sold it under. I bought one barrel of their product, I think, which was delivered. I think the barrel in which it came,—I don’t know exactly, but I believe the barrel was kind of a dark red, or maroon color. It was very much like the ‘Coca-Cola’ barrel in one respect,—across the heading of it was a little bit different, not exactly like ‘Coca-Cola.’ No, sir; it did not have a label on it. Yes, sir, I requested it to be shipped without the
- 568 label. It came from New Orleans, La., by freight, and was delivered to my store here in Mobile. The representative of the Koke Company didn’t ask me to come out and substitute this product for ‘Coca-Cola,’ but he said in the conversation I had with him,—he said, ‘When they ask for “Koke” or “Dope,” why it means that our product is to be sold because we have a registered name. We are sole owners of the name “Koke” and “Dope,” and you have a perfect right to serve them and serve our product; and when people ask for “Coca-Cola” to give them “Coca-Cola.”’ They didn’t insist on me serving ‘Coca-Cola’ when they asked for ‘Dope,’ but they said for me to use two cans, one for ‘Koke’ and one for ‘Coca-Cola’ and I bought under these conditions—that I use one for ‘Coca-Cola’ and one for ‘Dope’

when they asked for it. No, sir, I don't believe I had ever heard of any product except 'Coca-Cola' up to that time under the name of 'Koke' or 'Dope.' Q. 41. Then the fact that the Southern Koke Company was making a product which they were designating as 'Dope' and 'Koke,' was a surprise to you, wasn't it? A. Yes, sir.

569 * * * I said something to this agent at the time to the effect that I recognized 'koke' and 'dope' as nicknames for 'Coca-Cola.' Well, he told me to serve it under the name 'Koke' and if people asked for 'Koke' serve it—serve 'Koke.' He said I had a right to serve their product because they had a registered name which was a registration of 'Koke.' Q. 47. Anything said about 'Dope' in that connection? A. 'Dope,' too, 'Koke' and 'Dope.' You ask if anything was said about the product being like 'Coca-Cola,' by the agent; well, I think so, I believe it was supposed to be the same thing.

574 One of the representatives, I don't know which one, told me a man serving 'Coca-Cola' under the name of 'Dope' or 'Koke' would violate the law because they owned the copyright name for 'Dope' and 'Koke' and a man really ought to serve it when they call for that, be-

575 cause they own it and nobody else. * * * When we were handling this product of the Koke Company of America and had it in a separate container in the fountain and a man came and asked for 'Dope' or 'Koke' I gave him the product 'Koke' or 'Dope'—the product of the Southern Koke Company, Ltd., yes, sir. Well, we had that barrel because I was under the impression that they were the sole owners of the copyright name 'Koke' and 'Dope.' RDQ. 10. You thought you were compelled to do that? A. Yes, sir. You ask if I felt that I might be sued if I didn't handle it; well, I will tell you, I didn't like to be a substituter and I thought I was doing my duty to do it. Yes, sir; I got that idea from the state-

ment made to me by this representative of the Southern Koke Company. Yes, sir; that I would be a substituter if I didn't sell the product of the Southern Koke Company when people asked for 'Koke' or 'Dope.' You ask what I understood the purchaser meant when he asked for 'koke' or 'dope'; naturally, as I stated before, if a man asked for 'koke' or 'dope' I was under the impression all the time that he wanted 'Coca-Cola.' I knew that he wanted 'Coca-Cola' because 'dope' and 'koke' had been common names since I had been knowing it—nicknames for 'Coca-Cola' before I ever heard of any substitute or any other preparation with a similar name; ever since 'Coca-Cola' was put on the market, and I took it for granted that was what they wanted."

DAVE S. BAUER (Rec., 533), retail druggist in Mobile, Alabama, for twenty-odd years. During that time has handled and dispensed Coca-Cola. Had an interview in the latter part of the year 1913 or the fore part of the year 1914 with two men representing the Southern Koke Company of New Orleans:

- 534 "One introduced himself as the representative of the Southern Koke and Dope Company and said he had a soda fountain beverage that he thought would interest me. I just referred him to my head soda water man and he said he wanted to talk to me about it; said he had a cola drink that he could replace 'Coca-Cola,' that
- 535 we could serve at the fountain and save money on the 'Coca-Cola,' and the public or no one could tell the difference, and save at least fifty cents a gallon on it. When I informed him that I didn't use any substitutes for 'Coca-Cola' he told me that they had a copyright on their stuff 'Koke' and 'Dope,' and that when the trade called for it that way I was expected to serve that, otherwise I would be subject to prosecution. He said that he

had a copyright on the names 'Koke' and 'Dope' and argued that if people called for a beverage at a soda fountain under the name 'Koke' or 'Dope' that is what we would have to serve, but if we served any other cola drinks in that place we would be subject to prosecution.

* * * You ask me to state if this representative of the Southern Koke Company about whom I have testified, and who had this conversation with me, said anything about the possibility of selling his product on calls for 'Coca-Cola'; in reference to that, he told me that if I wanted to serve 'Coca-Cola' at my soda fountain, and serve 'Koke' and 'Dope,' that it would be necessary for me to have two casks, to keep out of trouble; that if I served 'Koke' and 'Dope'—at least if I served 'Coca-Cola' when 'Koke' and 'Dope' was called
536 for—I was serving something the customers didn't ask for and was liable to prosecution; that they had the copyright under that name. You ask if anything was said about substituting 'Koke' for 'Coca-Cola'; that was one of the first things that he told me, that I could serve 'Koke' and 'Dope,' and that the calls for 'Coca-Cola' the public wouldn't know it and couldn't tell the difference. * * * You ask if anything was said about the product he was selling which he denominated 'Koke' and 'Dope' being cheaper than 'Coca-Cola'; if anything was said to me about my being able to make more money in the sale of his products than I would in the sale of 'Coca-Cola,' and if that was held out as an argument for me to purchase; to all of these questions I answer—yes, sir. Well, that is pretty much what he said, I think, after first trying to induce me to buy his syrup, as I understood it, as a substitute for 'Coca-Cola,' and after I informed him that I never sold a substitute for 'Coca-Cola' and never expected to, he then told me, 'Maybe you don't know it, but our syrup is copyrighted. You have more

calls for this drink in our name than you do under the name of "Coca-Cola." Now, if you serve "Coca-Cola" when our drink is called for, why, you are subject to prosecution'; and I said, 'Well, I am going to see that they do not serve it.' He says, 'How are you going to do that?' Then I showed him a sign we had on the fountain that said, 'If you want "Coca-Cola," please call
537 for it by its correct name; that is the only cola drink we serve at this fountain.' Then, in addition to that, that when a customer calls for 'Coca-Cola'—that is, when they call for 'koke' or 'dope'—to tell them they want 'Coca-Cola,' and, if they raise any question to our question of their intelligence, we would simply show them the card and let them know there are two different drinks. Well, he said, 'You are busy and I will see you later,' and that was the end of the conversation with him. Previous to that time I had given instructions to my soda dispensers to make the inquiry of purchasers who asked for 'koke' and 'dope' if they wanted 'Coca-Cola.' When they say, 'Give me just what we ask for,' we say, 'Well, we don't carry anything but "Coca-Cola." ' In a good many instances they state, 'Look here, I didn't come in here to be jollied, I came in here to get what I want.' The dispensers would then say, 'We just don't serve anything else but "Coca-Cola," ' and this card would be shown to the purchaser, and in a majority of cases the fellows would just tell what they wanted. The card referred to is the one marked 'Plaintiff's Exhibit No. 100.' Of course, I watched this pretty close to see what effect it would have on my business, and visited my soda fountain more often than usual, and, whenever I seen that card shown them, without one exception I heard the reply, 'Say, I want "Coca-Cola." I didn't know there was two drinks, I didn't know there was another one like that.' "

GEORGE L. SEIBERT (Rec., 551), Bauer's dispenser, testified:

That he exhibited the "Koke" card, identified by Bauer, to the customers who used the word "Koke" or "Dope" at the soda fountain.

"When people come in and asked for 'dope' before I got this card, I would give them 'Coca-Cola,' and when we got the card down there Mr. Bauer told us what to do and say—we handed it out to them and they would say, 'You know what I want—"Coca-Cola"'—and it made a few of them mad, you know."

G. H. UPCHURCH (Rec., 521), drug business, Mobile, Alabama, testified:

- 523 "I remember a call I had from a representative of the Southern Koke Company of New Orleans about February 20, 1914. This representative did not talk to me personally; he talked to one of the men at the fount named John Graham. * * * He began to make a statement—a question, rather, of Mr. Graham at the fount, what they were serving when they had calls for 'dope' or 'koke.' Mr. Graham replied to him, saying that they were serving 'Coca-Cola.' This agent then informed Mr. Graham that they had no right to do it—that they had a patent or trade-mark on the words 'Koke' and
- 524 'Dope' and that they had the exclusive use of it and that we had no right to serve 'Coca-Cola' when 'Dope' and 'Koke' were called for. That was the substance of the conversation."

J. W. GRAHAM (Rec., 555):

Employed at Bienville Pharmacy in Mobile, Alabama. Came there on the 15th of February, 1914. About the

last of February had a conversation with a representative of the Southern Koke Company, Limited. He testified concerning that interview:

- 555 “Some one came in and asked for ‘koke’ and I served him with ‘Coca-C’ola’ and this gentleman walked up—he asked to see the boss—the boss was busy right then, but I told him he could see him in a few minutes. He
- 556 asked me if I had many calls for ‘koke’ or ‘dope,’ and I told him, yes. He asked me did I serve ‘Coca-C’ola,’ I told him yes. He asked me again did I think that they meant ‘Coca-Cola’ when they asked for ‘koke.’ I told him, yes, because I asked them what they meant and they told me what they meant, therefore I served them ‘Coca-Cola.’ He said, ‘Why not have a “koke”?’ You can get it a whole lot cheaper than you can “Coca-C’ola.”’ I told him I didn’t know anything about that; I didn’t know the price of ‘Koke.’ He said he was selling it and wanted to see the boss. I don’t know whether he ever saw him or not; I went to dinner. Anyway, we talked quite a little bit on it and I said that a man who asked for ‘koke’ and ‘dope’ or ‘shot,’ meant ‘Coca-C’ola,’ simply because when I first went behind the fountain I was an inexperienced man and didn’t know what they meant and they said ‘Coca-C’ola,’ of course. When I got experience, a man came in, asked for ‘koke’ nine out of ten he wants ‘Coca-C’ola’—you ask him and he tells you what he wants. I made this statement to this man, who said he was the representative of the Southern Koke Company. We got into an argument and he said that when a man came in and asked for ‘koke’ that I could serve him ‘Koke’ and he would be getting what he asked for; that is, I could sell him the product of the Southern Koke Company, Ltd. I said, ‘No, he means “Coca-Cola.” ’ ’ ’

PIERRE AUGUST CAPDAU (Rec., 664), a pharmacist, for thirty years in New Orleans:

Recollected an interview with a representative of the Southern Koke Company.

- 665 "Sometime in May of this year some gentleman was in the store and he said, 'You don't handle "Koke" or "Dope," do you?' I said, 'Yes, sir, I sell "Coca-Cola." ' 'Oh, that ain't right,' he said. 'We have got a trade-mark on the names "Koke" and "Dope" and you ought to sell it; every time you are doing that, you are violating the law.' 'Well,' I said, 'I don't see how—I have never known of a man who asked for "dope" or "koke" at my fountain but what indicated a desire for "Coca-Cola" ' ; and he says, 'You will have to discontinue that because if you don't discontinue it, why it might cause you some trouble.' I says, 'Well, I will tell you, I will look after the trouble; I am convinced when a man comes
- 666 in here and says he wants "koke" or "dope," he actually means "Coca-Cola," and I have never had a man to contradict me on that score, except you, sir.' 'Well,' he says, 'we'll get at that, we'll get at that,' something to that effect. He left and I have never heard from him since. No, I did not ask this man what he would have understood if a person had asked for 'koke' or 'dope' if he had been running a drug store five or six years ago; you see, I wasn't really doing the arguing with this individual; he simply was inviting it, and, naturally, I wasn't going into it, but I did say to him this: That, in all of my experience, I have never had any difficulty in giving a man 'koke' or 'dope' whenever he would ask for it, and I did feel as though that expression had been used for so long a time I couldn't really see where he could have had a trade-mark or a patent on the words. 'Well,' he says, 'we have got it, and you will hear from

it, you may hear from it yet on that subject.' I said, 'Go ahead, old man, these are my views and I stand by them; I feel that every time a man asks for "koke" or "dope" he means "Coca-Cola."'

C'ECIL V. ROGERS (Rec., 735), druggist, Dallas, Texas, has been in drug business for about twenty-three or twenty-four years:

- 736 "I had a call from a salesman representing The Koke Company of Texas, in reference to 'Koke.' The salesman wanted to put in 'Koke' to be served at the fountain. While he didn't exactly make reference to the fact that it could be served for 'Coca-Cola,' he made mention of the fact that when people called for 'eoke' give them 'Koke,' and when they called for 'eoke' that they were more than likely to mean they wanted 'Koke' than 'Coca-Cola'; and mentioned the fact that if I didn't give them 'Koke' and did give them 'Coca-Cola' that I would be infringing on 'Koke' inasmuch as they called for 'Koke,' and I gave them 'Coca-Cola.' You ask if I have ever known the name 'eoke' to be used as a short name for 'Coca-Cola' prior to this; oh, yes, it has always been called 'eoke' as far as I can remember. I have known of the product 'Koke' of the Koke Company of Texas not over three years. I was a soda water boy about 14
- 737 years ago at the Palace Pharmacy, at which time people very often used the nickname 'eoke' in asking for 'Coca-Cola.' I had a gallon of the product 'Koke' of the Koke Company of Texas in my store at one time. Yes, sir, at one time there was an experiment made by the Koke Company's salesman. A customer was drinking at the fountain and there was a little experiment made there claiming that the two drinks 'Coca-Cola' and 'Koke' couldn't be distinguished from each other, that they were so similar. My soda boy there made the experiment at

the request of the salesman of the Koke Company. This customer, who was sitting at the counter there says, 'I bet you I can tell the difference,' he says, 'all right, we will have the boy mix them up and see,' and took some out of his bottle and had the boy mix them and made a 'Coca-Cola' too, and while he turned his back the boy set them on the counter—the boy knew which was which—he set down the one he thought was 'Koke' and picked up the one that tasted more like 'Coca-Cola' to him, so he said, and drank it, but he was right, however."

CHARLES R. SMITH (Rec., 746), drug business at Dallas, Texas, about fifteen years:

746 "A salesman representing the Koke Company made
747 an effort to sell me 'Koke'—'K-o-k-e-' instead of 'Coca-Cola.' * * * They would make me a price on the syrup, and then, after using so much of their product, I was to have so much stock in the Koke Company. And then they made the argument that they couldn't tell the difference between 'Koke' and 'Coca-Cola,' and would make me a saving in using their product, 'Koke'—it would cost less than 'Coca-Cola.' They said if people came in and asked for 'Koke' just to give it to them. Yes, sir; I was recognizing all this time that 'Coca-Cola' was being called for as 'coke'."

O. M. BROWN (Rec., 763), clerk at the Oriental Drug Store, Dallas, Texas, and in charge of the soda fountain:

"A representative of the Koke Company sought to have our people handle it [Koke]. He said it was cheaper and said there was no difference in it and 'Coca-Cola,' but I tasted it and told him that there was a difference and I believe any one could detect the difference."

T. Q. MARTIN (Rec., 765), proprietor of the Owl Drug Store, Dallas, Texas, recollected a salesman of the Koke Company of Dallas calling; his name was Green:

“He came and asked me to sell ‘Koke’ and said it was just as good as ‘Coca-Cola,’ from the fact that it was being manufactured at Dallas, and, as a patriotic citizen, I should sell it, and that I wouldn’t be deceiving the customers because a man should get what he called for,—if he called for ‘Koke’ that we should have the ‘Koke’ to give him. Well, I differed with him; I told him that people called for ‘coke’—called it as a nickname for ‘Coca-Cola,’—and I told him that was a nickname that people generally applied to ‘Coca-Cola,’ that I had myself observed ‘Coca-Cola’ around the fountains; that they would say, ‘Give me a glass of “coke.” ’ ”

E. B. THOMAS (Rec., 766), who operates a soda fountain in connection with his confectionery business in Dallas, Texas, testified:

767 “A representative of the Koke Company tried to induce us to use the ‘Koke.’ My best recollection is that it has been over a year, maybe a year and a half ago. The argument he used was that I could make more money out of it than I could ‘Coca-Cola.’ Yes, sir, sell it to me cheaper; make me a better proposition. You ask if they said anything about its resemblance to ‘Coca-Cola’—being similar or the same as it; to my best recollection, yes; they said it was practically the same thing as ‘Coca-Cola.’ You ask if they made any threats against me unless I sold ‘Koke’; the best I remember on that, they said that when they called for ‘Koke’ that they were going to make us give them ‘Koke,’ and if they called for ‘Coca-Cola’ give them ‘Coca-Cola.’ That’s my best recollection of it. I think the gentleman I was talking to is

this gentleman here (pointing to Mr. Boyd¹)—I couldn't say as to whether or not he was connected with the company in an official way. My recollection is he was manager, but whether he said that or not I won't say; that's the idea I have now—that he was connected with the company; whether or not he was manager or president I wouldn't say. * * * You ask if anything was said as to whether or not my customers would be able to tell the difference; well, I don't know exactly on that, but my best recollection on that is that there would be no one that would make any kick on it at all, if they called for 'coke' and we gave them 'Koke,'—there would be no kick on it; that it was a first-class article, and that I could sell it as good as I could 'Coca-Cola.' * * * I think at one time they sent me down a gallon of 'Koke.' I put it in the pump, I believe I told the dispensers to try it—a few of them that asked for 'Koke' were given it and one of the dispensers came to me a few days later—I don't know how many days it was, and said to me, 'You can't get by with that stuff, Mr. Thomas.' I said, 'Take it out of the pump.' "

F. L. SKILLEN (Rec., 792), druggist, Dallas, Texas:

793 "I had an interview with a gentleman selling 'Koke.'
* * * He came in and introduced himself. I can't remember his name, in fact I couldn't remember your name that you told me yesterday, but he said he was selling 'Koke' and I told him that I didn't handle it. He asked me why I didn't handle it and I told him we didn't handle anything but 'Coca-Cola.' He says, 'What are you going to do when people call for "Koke?"' I said, 'I am going to give them "Coca-Cola."' 'Well,' he said, 'don't you know that you lay yourself liable to prosecution?' I told

¹Boyd though noticed as a witness by the Koke Companies was not called.

him I didn't think I did, that I didn't think any of my customers wanted anything but 'Coca-Cola' and that it was a free country and they had every opportunity in the world to prosecute if they felt that way, that we didn't sell anything but 'Coca-Cola' and would continue not to sell anything but 'Coca-Cola.' He then told me I ought to handle it. I asked his price and he said \$1.25 a gallon, and I told him 'Coca-Cola' didn't cost us that much the way we bought it. He was very persistent and I guess
 794 we must have talked for about three-quarters of an hour and I finally showed him the door. I told him that we believed and thought we were right, that ninety-nine out of every hundred that called for 'Koke' wanted 'Coca-Cola'—that I wouldn't state that positively, but that was our belief and we believed it so strong that that's what we gave them and we didn't have anyone to kick on it. He stated his product was cheaper than 'Coca-Cola.'

GEORGE C. KERSHAW (Rec., 811), manager of the Dade Drug Company, Dallas, Tex.:

"I had a visit from a salesman representing the Koke Company of Texas, in Dallas.

The only argument that he advanced was that I could buy it cheaper than I could buy 'Coca-Cola,' and that I could sell it and realize more profit and the public wouldn't know any difference,—that I could use it as a substitute, in other words."

TONY GIARRAPUTO (Rec., 814), in confectionery business thirteen or fourteen, maybe fifteen years at Dennison, Texas; selling "Coca-Cola":

815 "Yes,—it was a nice looking gentleman come into my place and says he want to sell me something 'Koke'; I tell him 'Is it "Coca-Cola"?' He says, 'No, it's same thing

exactly like "Coca-Cola," ' and they tell me it was one of the firm that used to be the one that makes 'Coca-Cola' makes it, and I tell him,—well, we were speaking about contract; I tell him, 'If you sign a contract which is pure "Coca-Cola" I will take a barrel on trial, but if it not good "Coca-Cola," if it's not "Coca-Cola," I send it back,' and of course, he forces me to sign a contract, and that they give me a share in the business, and before I sign a contract with you in regard to this business we got to go to lawyer, because I no sign no paper until I know what's doing, and of course, I never see this man no more, and he really no call on me since that time."

Mrs. C. E. FLAGG (Rec., 826), confectionery and floral shop, Oak Cliff, a suburb of Dallas:

- 826 "I had an interview at one time with a salesman selling a product which he called 'Koke.' He wanted to sell me this 'Koke' for ninety cents a gallon. He said it would be a great saving as 'Coca-Cola' would cost me (\$1.50) a dollar and fifty cents; I told him I didn't want it. He said you couldn't tell the difference between 'Coca-Cola' and 'Koke' and also that the people couldn't tell the difference between them. I told him when people asked for 'coke' that they wanted 'Coca-Cola' and he said that they didn't, that they wanted 'Koke'; he said, 'Of course, when people come in and ask for "coke" they want "Koke"' and that we were supposed to serve 'Koke'; and I said, 'No, when a person asked for 'coke' it's just a short way of asking for "Coca-Cola." ' ' ' "

PETER CAMARINOS (Rec., 827), confectionery dealer, McKinney, Texas, testified:

- 827 "I had a call from a man representing the Koke Company here in Dallas—I couldn't remember exactly—two

or three months ago. He had some 'Koke' which he offered to sell me. Tell me sell it cheaper than 'Coca-Cola' and make more money than I could by selling 'Coca-Cola.' You ask if he said I could sell it for 'Coca-Cola'; yes, sir. You ask if he said it was like 'Coca-Cola'—couldn't tell the difference, anything of that sort; no, he say people can't tell difference. * * * Yes, sir, he said to me that it was as good a drink as 'Coca-Cola' and he says I can sell it for 'Coca-Cola.' Yes, sir; I am sure he told me I could sell it for 'Coca-Cola.' "

T. J. BRITTON (Rec., 829), retail druggist, Dallas, Texas, testified:

- 830 "I recollect having a representative call upon me trying to sell me the product 'K-O-K-E' made by the Koke Company of Texas. I think it was about three years ago that he came in the store and tried to sell me some 'Koke' and, of course, the argument that they all put us is that it can't be told from 'Coca-Cola,' and I think it was cheaper—I think he offered it at about a dollar a gallon, and I told him, no, I didn't care for it, I didn't dispense anything but the genuine 'Coca-Cola' and had never handled any substitute for it; and, in the course of the conversation, he intimated to me that when I sold a man 'Coca-Cola' when he called for 'Koke' that I was substituting, and I immediately told him that he would have to withdraw from my office, that I didn't have time to talk to a man that would advance that kind of an argument. Yes, sir, the public, when asked for 'Coca-Cola' at my fountain, prior to that time, had been asking for it under the name 'coke.' "

J. M. PENLAND (Rec., 1978), president, Waco Drug Company, Waco, Texas, testified:

1978 "I had an interview with a man, named Moore, representing the Koke Company of Texas,—I think it was in the spring of 1913,—in my office at Waco, Texas. Mr. Moore came into our place and solicited our business, wanting us to act as distributors for the Koke Company of Texas, and made us a price of \$1.25 per gallon to any of our trade on direct shipments, or to us for our stock, and he offered as his argument for our handling it, that they were in position to give us this price because they were not doing any advertising, that the average person who called for 'Coca-Cola' used the word 'coke,' and that they would get the benefit of the advertising done by the Coca-Cola Company, and that the retail man could conscientiously justify himself in dispensing 'Koke' on such orders or on orders that he thought was intended to be 'Koke.' "

EDWARD T. LANGAN (Rec., 894), 55 East Congress street, Chicago, testified:

895 "I recall an interview with a young man, Mr. Mayfield, who tried to sell me a product under the name of 'Koke' a short time after I went to the Auditorium Pharmacy. He was in there, I judge, about five or six times during the spring of 1913. I don't know exactly the words that Mr. Mayfield used, only he wanted to sell me 'Koke,' or some substitute. He claimed that it was made the same as 'Coca-Cola' and it could be sold the same as 'Coca-Cola' without anybody ever detecting the difference. You ask me to explain my last answer a little bit, and you ask if I mean that Mayfield told me that it could be sold for 'Coca-Cola' when people asked for 'Coca-Cola'; no, he said that the men who used to

make 'Coca-Cola' was now making this product, and,
896 therefore, it was the same thing and it could be sold as
Coca-Cola.' ''

J. W. Mayfield was asked concerning the representations that he made to soda fountain proprietors, and stated (Rec., 1529): "I cannot remember the different lines of talk I put up to the different soda fountain people."

And again (Rec., 1530): "I cannot remember what I told those dispensers and proprietors. I never sold goods with the same line of talk to any two men."

J. W. Mayfield's card is reproduced in the "Statement of the Case" in brief of The Coca-Cola Company.

These statements are confirmed by the admissions of the Koke Companies' witnesses.

ROBERT E. OUSLEY, of Kosciusko, Mississippi, in the drug business, a witness called by the Koke Companies, testified as follows:

- 1447 "A traveling man came around and told me that Koke and Dope were copyrighted by the United States Government and we had as much right to sell it as Coca-Cola, when a man come in and said 'Give me a Koke or a Dope,' it was copyrighted. He said those two names are both copyrighted. He said 'Koke and Dope are copyrighted drinks, just the same as Coca-Cola is a copyrighted drink.' He said, 'If you do not give him
- 1448 Koke or Dope you are infringing on our name as much as Coca-Cola or anyone else for that.' I bought it because I could know what they were calling for, Koke and Dope. It costs a little less than Coca-Cola. There is more profit over the counters. We put this in and when a man comes in and calls for a Koke or a Dope we give it to him and when a man calls for Coca-Cola we have Coca-Cola for him which we always have. He just said

'This is a Cola drink, he said a Cola drink.' I do not remember him saying it tasted like Coca-Cola. He made the drinks and showed them to me.

He had a sample, and he said, 'Here are two drinks.'

Q. 122. Oh, two drinks. What about the other one? Did he ask you to draw a Coca-Cola from your fountain?

A. He did not draw a Coca-Cola. He said, 'You know what Coca-Cola is.' He said, 'Here is my cola drink.'

Q. What two drinks are you talking about?

A. Koke and Dope.

Q. Is that two drinks or the same thing?

A. The same drink,—and he said, 'There is your Coca-Cola.'

When people come in and ask for Koke or Dope we give them that one thing which comes to me, Koke or Dope. It comes from the Southern Koke Company of New Orleans."

HUGH LEE BOYD, a druggist of Kosciusko, Mississippi, called by the Koke Companies, testified:

1455 "I bought this product from the Southern Koke Company from Mr. Patton. Think he told me about this Koke and Dope, that he was handling, and wanted to put in some. He said it sure was a good thing and he was selling a good deal of it. He had a sample and mixed a drink. I did not know which one I was drinking, Coca-Cola or it. He never said a word about it being like Coca-Cola. He told me I could not tell them apart, I think."

MAX BLOOMSTEIN, drug business, 506-508 Church street, Nashville, Tennessee, called by the Koke Companies, testified:

1148 "I have been handling Koke and Dope about a year or such a matter. It comes to me labeled Koke or Dope. I changed to Koke and Dope because Koke and Dope are copyrighted names and I thought I was liable to indictment if I served anything else. When I was first approached to buy Koke and Dope I refused to buy it. I told them I had as many of those drinks as I wanted,

and a card was handed me on which I saw that Koke and Dope were copyrighted. I immediately went to my soda dispenser and told both of them if anybody asked for Koke or Dope for them to be very particular and ask if they wanted Coca-Cola. I know there are a whole lot of men out in the employ of the Coca-Cola Company and I did not want them to trap me. I am not particularly fond of lawsuits and for that reason I know if a man asked for a koke or a dope and knew of the Koke and Dope preparation, he wanted that. If he meant Coca-Cola he wanted them to give him Coca-Cola so I told my dispensers if anyone asked for Koke or Dope to ask the question, 'Do you mean Coca-Cola?' Some did mean Coca-Cola and some did not mean Coca-Cola, but there were some of them that took offense at the question: 'What do you mean, Coca-Cola?' Some says: 'None of your damn
1149 business, you ought to have enough sense to know,' or words to that effect. They became angry and at the end of two days my head dispenser said to me: 'I think you had better not make us ask that, we are offending some of our customers, they seem to take offense.' Because they all considered we should know what they wanted. It is pretty hard to know just what one will become offended at. * * * That is one of the kind of cards that was handed to me, as well as I can remember (indicating a card known as Exhibit No. 9), stating on it that Dope and Koke were copyrighted names. That is the reason I made my change from selling Star-Cola when Coke and Dope were called for, to Koke and Dope when Koke or Dope is called for. * * * There was a time I handled Coca-Cola and did not handle some similar drink to it. I do not remember there were very many calls for Koke and Dope at first, it has only been within the last few years that the slang has crept around amongst
1150 the young people. The better class of people coming into the store do not call for Koke or Dope, they call for Coca-Cola if they want it. I gave them Coca-Cola when they called for a Dope or a Koke at that time. I changed it to Star-Cola because Star-Cola was considerably cheaper. Koke and Dope are cheaper than Coca-Cola.

SCHEDULE VI.

The product of the Koke Companies has been systematically and habitually sold to the public as and for Coca-Cola.

B. W. FULLER (Rec., 833), Dallas, Texas, in soda water business. Has been in Vienna Ice Cream Factory, Kirby Drug Company and the Palace Drug Store:

- 833 "You ask me if they complained when I served them 'Coca-Cola'; yes, sir, they complained when I gave them 'Koke,' They complained—I say they meant 'Coca-Cola.' The Kirby Drug Company at one time dispensed 'Koke' over its counters. They carried it exclusively as long as they lasted,—the last month or so while I was there. You ask if they sold it as 'Koke' or as 'Coca-Cola'; they
- 834 sold it as both. If a man came in and called for 'Coca-Cola' they served him 'Koke'—they didn't have anything else to serve him. Sometimes they told him what they were selling, told him it was 'Koke,' and sometimes they didn't—supposed to tell it along towards the last, they were supposed to tell him it was 'Koke.' You say you are not trying to find out what they were supposed to do, but whether 'Koke' was sold by the Kirby Drug Company as 'Koke' or as 'Coca-Cola'; as both—first it was sold as 'Coca-Cola,' as long as it lasted, and then they sold it as 'Koke.' It must have been about a month, I guess, that they sold it as 'Coca-Cola.' No, sir; they did not have any 'Coca-Cola' in stock when they were selling them 'Koke' for 'Coca-Cola.' One reason why I quit them was on that account, I had so much trouble about the 'Coca-Cola' customers. They kicked on it. The customer that came in there, one thing would bring on another, about what the drink was, that it wasn't

right, that they wanted 'Coca-Cola' and couldn't get 'Coca-Cola' and got 'Koke'—they would be dissatisfied. You ask why, then, did I quit, and why I could not have told them when they were asking for 'Coca-Cola' that I was serving them 'Koke'; I did tell part of them and they all quit. * * * Along towards the last I served it as 'Koke' to those people, but at first I served it as 'Coca-Cola.' ”

D. P. ENGLISH (Rec., 802), drug business, Dallas, Texas:

802 “I was with the Palace Drug Company for several months. They handled 'Koke' and I think they handled it exclusively. I don't think they handled any 'Coca-Cola,' I never knew of them buying any while I was there. They got this product 'Koke' to which I refer, from the Koke Company in Dallas, Texas, in barrels, colored red. * * * When people come into the Palace Drug Store and called for 'Coca-Cola' they would serve them 'Koke.' I never heard them advise them that it was not 'Coca-Cola.' That practice continued in the Palace Drug Store for about three or four months, I think, in 1913, and ceased when Messrs. Florence & Nos-sick got it. Before the latter gentlemen got hold of the business, Pyle was manager of it. I don't know who were its owners, it was a stock company. This new concern bought it out, I believe, about the 15th of July, 1913, and they immediately went to ordering 'Coca-Cola.' I 803 left there on the first of December, so I don't know anything about their business since then. * * * Yes, sir; I mean to say that I served 'Koke' to those people for 'Coca-Cola.' You ask who told me to do that; it was put in the jar and labeled that and it was their method of doing business, it wasn't my business to get up and publish these things, I was paid to sell a man this stuff and I would just sell it. It was the business of the Palace

804 Drug Company, I was just working for them. You ask what I know of their methods; well, I know they had the jar labeled 'Coca-Cola'—I know they wouldn't expect me to get up and go ahead and explain that it wasn't 'Coca-Cola,' I noticed the fountain men didn't do it, if that had been their intention, or if they wanted it done they would have notified me. Yes, sir; I did see a jar labeled 'Coca-Cola.' I am sure they did have such a jar and I am sure it contained 'Koke.' * * * You ask if I reported to anybody that I was selling 'Koke' for 'Coca-Cola'; I discussed it with men there in the store, and they argued there was more profit in selling 'Koke' than there would be in selling 'Coca-Cola' and you would get just as many customers as you would by selling 'Coca-Cola.' You ask if it was not well known that our store was carrying 'Koke'; it was among the boys in the store."

The admissions of dealers handling the Koke Companies' product and called as witnesses by them shown in the following extracts from the record, clearly show the deliberate, systematic passing off of the Koke Companies' product for Coca-Cola:

C. P. EMBREY, retail drug business, at Chattanooga, Tenn., a witness for the Koke Companies, testified as follows:

1022 "I heard the term dope used. At that time there was no other drink on the market but Coca-Cola, and I understood that was what they wanted. That was what I un-
1023 derstood they meant by Dope. At the time I handled Afri-Cola and Coca-Cola alone and a man came in and called for a dope, I gave them Afri-Cola. Because of more profit. When I put in Ko-Nut I gave up Afri-Cola. Afri-Cola is not nationally advertised, I do not think. When a customer asked me for a dope I gave him the only thing we had, Ko-Nut. The drink was palatable

and pleasant to the taste and another reason was because I made a better profit. Now, when a person asks for dope, I give the one we make the best profit on, which is either Koke or Ko-Nut. * * * We serve Koke when dope is asked for. I have been handling Koke for about two years. Commenced using one urn for Coca-Cola and one for Ko-Nut or Koke since January, 1914, before that time I was serving both ways, in bottles. I had one bottle sitting on one side. I might have served Ko-Nut, Coca-Cola and Dope out of the same urn. * * * When a
1026 man came in and asked for a dope at that time I had those two dispensing bottles up there and Coca-Cola in the fountain, I gave him either one, Koke or Ko-Nut. I never gave him Coca-Cola because I thought it was more profitable. I quit selling Coca-Cola in response to calls for Dope when these other drinks came out which were cheaper. * * * When a person came in and asked for
1027 a Dope I gave him Coca-Cola, but since these cheaper products have come on the market we give the cheaper product. That is the instructions at our place to our men. * * * Until these cheaper products came on the market I understood Dope to mean Coca-Cola. The cheapness of the product was what changed me. * * * There is no question about the drinks being of the same color and taste, and I cannot tell the difference. * * * Prior
1035 to the time I had Ko-Nut and Afri-Cola, I had calls for Koke. I gave them Coca-Cola. That was what I understood they wanted at that time. Koke and Dope do not mean anything particular since the low-priced drinks have come on the market. I do not sell Coca-Cola now in response to either call, and if Coca-Cola was the same price as these others I would sell it in response to orders for Koke or Dope. * * * I changed the system
1037 to avoid the possibility of substituting. You see a boy would not be as discriminating as a man and it may be that they did substitute."

J. B. FREED, in confectionery business, under name of Freed & Haas, Nashville, Tennessee, called by the Koke Companies, testified as follows:

- 1174 "My instructions to all my fountain boys, whenever we get a new man, is to tell him when a man calls for Coca-Cola to give him Coca-Cola, and if he calls for Dope or Koke, to give him other things the profits are better on, to always give them what they call for. That is on account of the profit. I am working for Freed & Haas, not the Coca-Cola Company. I have had the Coca-Cola Company representatives come there and take out a drink and push a Coca-Cola back and say it was not their
1175 drink. I said whenever they wanted to get a soft drink or a substitute, to call for it. I did not give it to them. I have always gone to the fountain and told the boys to set up two drinks, put one Coca-Cola and one Dope, and push the Coca-Cola to me and the Dope to the gentleman, and I would give him a wink and say 'Drink this,' then say to him, 'Drink that,' and for him to tell me which it was, and he would push the koke* back and say the other is the Dope. And I would give him a sample of the syrup out of each barrel so as to show which is Coca-Cola and the other Dope."

JOHN R. PARDUE, Assistant Manager and head dispenser of the soda fountain, at Freed & Haas' place, Nashville, Tennessee, another of the Koke Companies' witnesses, testified:

- 1134 "Some customers called for Coca-Cola, some for Dope and some for Koke. We have had a few calls for a shot in the arm. When a customer asks for a Dope or a Koke I give him what he calls for. If he calls for

*Attention is called to the fact that this adverse witness unconsciously uses the word Koke meaning Coca-Cola, showing how firmly the nickname is established.

Koke I give him a Koke. If he calls for a Coca-Cola I give him Coca-Cola. Mayfield makes Koke. * * * When a customer comes into our establishment and asks for a Koke or a Dope I do not know what he wants any more than I give him what he calls for; in other words, I give him the drink that costs the less money in response to Koke or Dope. I give him Mayfield's Koke or Dope, that costs less than Coca-Cola. * * * When customers
 1136 ask for Koke I could not say and know that they want K-O-K-E but a fellow would be a damned fool not to give Koke that costs less than Coca-Cola. If you were working for me and give Coca-Cola syrup that costs me more money to a fellow who did not call for it, I would not fire you but I would pick you up and throw you over the counter. If he calls for coke or dope I am giving him the cheapest syrup I have on the fountain * * * I fooled one of the Coca-Cola men and offered to bet him about it, but he would not bet. He took Mayfield's Koke and thought it was Coca-Cola. * * * I gave orders for that to the three boys at the fountain. I says, 'If they want Koke or Dope give them Mayfield's stuff; if they want
 1137 Coca-Cola, give them Coca-Cola.' Their instructions were to give them what they called for. When Koke, Dope, Shot in the Arm, and those terms are called for I serve the cheapest drink I have got. It applies to a cola drink. I do not know that they want Coca-Cola. I have never served Coca-Cola in response to calls for Koke,
 1138 Dope or Shot in the Arm. I do not know whether the nicknames apply to Coca-Cola. They want a drink on that order, a cola drink. I don't know whether some of them mean Coca-Cola. I take it they want a cola drink, because those drinks are cheaper, that is the reason. I do not know whether they want a Coca-Cola or not. I feel justified in giving them what they want if they do not call for Coca-Cola. * * * I first heard the ex-

1139 pressions Koke and Dope some ten or twelve years ago,
I think. * * * Have heard Dope and Koke in con-
nection with Coca-Cola at that time. * * * Don't know
1140 of any person calling for Koke or Dope at Fried &
Haas' that knew we handled it."

E. A. SHARP, a druggist, 521 Hagan street, Jacksonville,
testifying for the Koke Companies, said that he had
handled Dope for about three years and obtained it
from the Koke and Dope Company at New Orleans:

1253 "I gave anything we wanted to when they called it
'dope,' except Coca-Cola. We had a drink that did not
cost as much as Coca-Cola. These other drinks cost us
less than Coca-Cola and that is the reason for it, every-
1254 body does it. * * * If a man comes in and asks for
Koke or Dope, I do not know he wants Coca-Cola. If
they call for dope they get dope. Gay-Ola costs us less
than Coca-Cola, and it is sold for the same amount to
the consumer, there is more profit in it to us. It looks
1255 and tastes like Coca-Cola. * * * A lot of people think
there is not but one cola drink in the world and that is
Coca-Cola. When they called for Dope they got Dope
regardless of the cost, that did not make me give it to
them any quicker. We give them what they call for re-
gardless of cost. When they call for Dope and Koke we
give them Dope and Koke. We gave them various things
when they called for dope and koke at first because they
do not specify the different drinks, we were privileged
to use what we wanted and naturally we gave the cheaper
drink. * * * I do not say what people think because
I do not know. * * * Some people may term Dope
and Koke as Coca-Cola, but we never did term dope as
Coca-Cola, unless they specifically said after asking for
1256 Dope that they wanted Coca-Cola. We would rather
serve something else we made the most money on. I sup-

pose I could sell Coca-Cola as Dope too, if I wanted to; you can use it as you like. I said I can serve anything I like when they call for Dope, it is not Coca-Cola. I consider the cost when I am selling it. We consider Dope applies to any cola drink as long as it is a dope. I do not know whether they are all cheaper than Coca-Cola, all that I have handled are cheaper. You can serve anything you like for Dope and naturally a man would give the drink he made the most money on. There was no excuse to it; we gave them Dope or Kope either one if they did not ask for Coca-Cola; they did not ask for Brain-Ol or Gay-Ola we gave most any kind of dope. We are always looking for something to make more profit and that includes the whole business. When the public commenced using the terms Dope and Koke, we could sell dope and Koke and I was glad it was there; I am glad to make more profit, naturally. All these drinks are similar in color and taste to Coca-Cola and are cheaper
 1260 than Coca-Cola. * * * I do not know that I can say I never had served any other drink besides Coca-Cola when Coca-Cola was called for because you are liable to get them mixed up in a soda fountain. They are so much alike I think anybody is liable to get them mixed up."

R. A. THORN, a druggist of Meridian, Mississippi, testifying for the Koke Companies, said:

1423 "I have been dispensing Coca-Cola ever since it was brought into the state, I think, about 24 years ago. I am handling Coca-Cola now. When I was handling Coca-Cola and before I handled this Konut, Gay-Ola or Afri-Cola, when a man came into my place of business and asked for a Dope or a Koke we gave Coca-Cola. I thought he meant Coca-Cola, because that was the only thing that was handled at that time as Dope. It goes back twelve
 1424 or fifteen years ago. * * * When a man comes in

now and asks for a Dope or a Koke I give him out of the Dope or Koke container, the product of the Southern Koke Company, Limited, and every time a man comes in and asks for a Coca-Cola, I give it to him out of another container. * * * I told them when Dope was called for to serve the Dope syrup, and when Coca-Cola was called for to serve the Coca-Cola syrup. The Dope or Koke syrup is one syrup."

H. F. CHRISTLER, a druggist of Jackson, Mississippi, called by the Koke Companies, testified as follows:

1435 "If he knew the man asking for Coca-Cola wanted Dope, that he had been trading at the store before and knew that he wanted Dope, he would draw them out of the same container. He will know from past experience that he wanted Dope, and we give Dope and he is satisfied. I do not think that is substitution. It may be legally substitution. The reason it is not substitution is that because before I have served them with Dope syrup and he has liked it and I do not think that is substitution and he apparently liked it and does not kick."

DR. J. G. PYLE, owner of the Palace Drug Company of Dallas, testifying for the Koke Companies, is confused between Koke and Coca-Cola. He said:

1721 Q. 19. "Did a representative of the Coca-Cola Company ever call on you? A. Oh, yes; sure.

Q. 20. Who was that? A. Why, Mr. Boyd, I think represented them.

Q. 21. The Coca-Cola Company? A. The Coca-Cola Company, I thought you said the Koke Company.

Q. 22. Yes.

* * * * *

1723 There was about a week or two there I think, that I did

not have any Coca-Cola, after Mr. Harris rounded me up so, I never ordered any more then for awhile and I think I got out for a week or two, I don't remember the exact length of time, I know I was out a little while, and during that time I told the boys to tell them that we did not have any, that we were out. So far as I know they followed my instructions, but you cannot tell about a
1724 soda boy, they may do anything. * * * At that time I was in the soda business and the word, I just heard it in the store. I had talked about Koke, fellows drinking Koke, and so on, and being great Koke drinkers. I do
1725 not know what drinks were referred to in that connection. I never had handled anything called Koke at that time; they may have been talking about Coca-Cola, and may have been talking about Koke. It might be possible and very probable a lot of people may call for Coca-Cola when they call for Koke. Maybe some shorten the name into Koke. I instructed my boys when we handled both if they call for Koke to give Koke and if they call for Coca-Cola to give Coca-Cola. I never did hear anyone kicking about it. If they wanted Coca-Cola and drank Koke they did not object. I tell them to do that because I never could tell the difference. I only handle Coca-Cola at our store now. The boys know we handled Coca-Cola and give Coca-Cola. I guess we do not give Koke because we do not handle it. The customers have not
1726 kicked. * * * I do not know whether Coca-Cola was called Koke in 1903 or not. I never had heard it called Koke up to that time I was out there. I am satisfied of that, but the name is used more and more up till this day; it is used more now than before. A man calls for Koke and lots of times now I do not know whether he means Coca-Cola or Koke. Before the Koke Company of Texas started in Dallas, it is possible—I say it is not improbable, that they did call Coca-Cola Koke at that time; they may

have done so. Before I bought anything from the Koke Company, I think I heard Coca-Cola called Koke, I could not say, I could not call any certain time when it was
1728 called Koke. * * * It would not be difficult for the soda man to know which he was serving. I cannot tell the difference either in taste or appearance of Koke and Coca-Cola. The man who came in and asked for a Koke was served with the product of the Koke Company of Texas. That is what I instructed my boys to do. Of course, I could not stand there and watch them and see what they were serving. I took it they did what I told them. If I thought they were not, I would not have kept them working. I always felt satisfied they were doing what I told them. They could have mistaken one for the other if they had been side by side and no labels on them. They could have gotten them mixed up, but we were very careful not to get one in the other; there was
1727 no reason to do so. * * * Koke syrup costs us less than Coca-Cola."

The admissions of the witness Pyle, who, by the way, owned stock in the Koke Company of Texas (Rec., 1728), confirm the testimony of the witnesses Fuller (Rec., 833) and English (Rec., 802), dispensers at the Palace Drug Company, Dallas, who testify that they passed off Koke in response to calls for Coca-Cola. (*Ante*, pp. 142, 143.)

C. J. THORNTON, a druggist of Hattiesburg, Mississippi, called by the Koke Companies, testified:

1772 "Customers using the term Dope or Koke, anybody knows they wanted a cola drink. Because I had good common sense, and a man with one-third or half sense would know that, when a man asks for a Dope if he has sense enough he knows he wants a cola drink. If they wanted a particular drink they would ask for it. Whenever a man come in and was particular enough to ask for a Coca-Cola, we were always particular enough to

give what he asked for. When a party comes in and asks for a Dope they want a cola drink; that is what I know. I know from being around the soda fountain, putting it out, and I know if they come in and ask for a Dope and I give them a lemon soda they would throw it in my face, the particular ones, and the ones that want

1773 Coca-Cola ask for it. How would I know that they wanted a Coca-Cola drink when they asked for a Dope? How do I know they want a Coca-Cola? When they ask for Coca-Cola I give them all credit for having sense enough to know what they want. I think when he asks for a Dope that he wants a cola drink; I never go into the details. There are a few people in town, regular customers, who walk in and say, 'I want a Coca-Cola.' You can pretty nearly always tell when they want a Coca-Cola. That is so. At one time the Coca-Cola people came in here with some pimps, and got around on the street kinder circulating around, you know, about poison, that some of the drug stores here were selling stuff that was poison for Coca-Cola, and they went so far as to advertise, the Coca-Cola Company has, on the different places, to ask for Coca-Cola by name, and that went along so when the street car boys I noticed would come in and ask for Coca-Cola. They would ask for Coca-Cola; they got it; people that had been asking for Dope got it; asked for Coca-Cola. They run it up here one week where we would use usually a gallon of Coca-Cola every other day, where we had been using a gallon a week sometimes. The Coca-Cola people advertise, ask for it in its own name. They do that they said to avoid substitutes. It went pretty hard and we had to pay a dollar and a half a gallon for that when they said ask for it by name to avoid substitution, for a man to ask for it. I do not remember they said not to use nick-names. I think they had one on at the picture show down

1774 there. Coca-Cola costs a dollar and a half; Koke a dollar a gallon. I handled them because it was better; is a better stuff and gives better satisfaction. There was more profit in it. We got the same price over the fountain. I handled the Dope because I like it better and because it gives better satisfaction than Coca-Cola at a less cost. I said I liked it better than Coca-Cola; it gives satisfaction. I base my better satisfaction when you take it up and drink the whole thing down and say, it is a good drink. I do not suppose any customers knew
 1776 what they were getting. * * * If you want to go to assumptions, I just assumed if they wanted Coca-Cola they would ask for it; if they called for Dope they wanted a cola drink."

A. S. GOODY, druggist of Lucedale, Mississippi, a Koke Companies' witness:

1786 "I dispense Dope and Coca-Cola. This Dope is bought from New Orleans, the product of the Southern Koke
 1790 Company, Limited. * * * I have been handling the product of the Southern Koke Company, Limited, about two years. I handled prior to that time Coca-Cola exclusively. I had calls at my fountain prior to the time that I handled the product of the Southern Koke Company for Dope or Koke. * * * I give Coca-Cola on calls for Dope and Koke. I did not understand it. * * *
 1791 I put in this product called Dope by the Southern Koke Company, Limited, about two years ago. I do not know the exact date. This product cost me one dollar twenty-five a gallon, with a twenty-five cents a gallon rebate if you pay within thirty days. Coca-Cola cost one dollar-fifty, a rebate of five per cent., I believe, if you buy one hundred gallons and more for larger quantities. * * *
 1792 My instructions in that connection is if a man comes in and calls for Dope, give Dope; and if he comes and calls

for Coca-Cola, give Coca-Cola. I do not know anything about what he wants. I give him what he asks for. I give him the one made by the Southern Koke Company, that is the cheaper product of the two. I make more profit on it; it costs us less money. It is not why I do it. I do it because it is what they ask for. I do not know what they want. I give them what they ask for. I do it. I just want to make it clear to you that I would do that if that were the higher priced product. I will say this, that I have some customers who tell me that they want Coca-Cola, and in fact I can name two, Mr. Boling and Mr. Johnson. They frequently call for a Dope and we always give them Coca-Cola. The dispensers know them and know what they want and always give Coca-Cola. When customers ask for Koke I give them Dope; sometimes I might get it mixed up and give Coca-Cola. Dope and Koke, the Southern Koke Company claim in their letters and advertising, they state that the two products are the same. One product with two names is the impression I have. I do not know about that. When a man comes in and asks for a Koke I give the product of the Southern Koke Company. I suppose when they ask for Dope I give Dope, and when they ask for Coca-Cola I give Coca-Cola, and when they ask a usual thing I think we give Dope. Prior to handling the product of the Southern Koke Company, about two years, with the
1793 exception of one barrel of Gay Ola eight years prior to that, people who asked for Dope and Koke at our fountain were served Coca-Cola. I do not know what the people want when they ask for Dope or Koke. I serve the product of the Southern Koke Company. That is cheaper than Coca-Cola."

E. J. WILLIAMS, a druggist of Hattiesburg, Mississippi, one of the Koke Companies witnesses, testified:

- 1811 “I dispense Koke and Dope which I get from the Southern Koke Company of New Orleans. I could not tell you when I first heard the expression Koke and Dope. I have been calling for it that way myself ever since I can re-
- 1812 member drinking Coca-Cola. I do not know what I wanted when I asked for Dope back there in those times. I just called for a Dope. Sometimes I reckon I wanted Coca-Cola; that is, a great many people, I reckon, when they wanted Coca-Cola would call it Dope, Dope or Koke. I do not know as that is true today. I do not know what a man wants when he asks for a Dope, whether Coca-Cola, or what when he calls for Dope or Koke. Today, if a man would ask for a Dope I would give him Dope or Koke. I do that because I have it in stock; I give him what he calls for. I have Coca-Cola in stock. I would
- 1813 not refuse to give him Coca-Cola, and we do do it, I have seen the boys do it, I have done it myself. As a rule, we give Koke or Dope. It is to my interest to do it, that is about all, and I try to give him what he calls for.
- 1814 * * * If he wants Coca-Cola and calls for Koke or Dope he won't get Coca-Cola, if that was what he wanted. That is my choice in the matter. I am at liberty to do it and that is the reason I do it because I want to, because I like to do it. It is fifty cents a gallon cheaper; I guess I look after the most in that line. I keep that out as Koke or Dope. They come in and call for Koke or Dope, why would I give Coca-Cola when Koke or Dope would do? I give him what he calls for. We have made that rule here, as well as we could to give exactly what he calls for.”

W. A. HICKMAN, a Koke Companies' witness of Monticello, Mississippi, says:

1821 "I am in the drug business in which I dispense Coca-Cola, Dope and Koke. Koke is made in Atlanta, I guess. The Dope product we got from New Orleans, the South-
 1823 ern Koke Company. * * * I do not know whether
 1824 people that ask for Dope or ask for Koke may want Coca-Cola. You take people where I am they do not know; you cannot find two out of ten there that know Coca-Cola from Dope; they are not used to them; I have tried the two drinks. A lot of people they could not tell the difference in Coca-Cola from Dope and Koke; there may be people that can. The two drinks look the same and taste the same; a customer receiving it would not know the difference. Prior to going into the drug business I was salesman in a drug store. I have heard the terms dope and koke used before I went into the drug business. I knew of different matters; I knew there was two companies handling it; a lot of people do not know
 1825 it. * * * I never serve Dope or Koke when Coca-Cola is called for; if they ask for Dope I give Dope. For a Dope he gets Dope and if he asks for Coca-Cola he gets Coca-Cola. * * * I buy Koke and Dope from the
 1826 Southern Koke Company; Koke or Dope is the same product; it costs a dollar and a quarter and I get a rebate. I get a rebate of 25 cents for paying in a certain length of time; if it is not paid then it is the full amount. We are rebated for the number of gallons we use during the year for Coca-Cola. I handle this product because it is cheaper than Coca-Cola; that is my reason for handling it, but if he asks for Coca-Cola he gets Coca-Cola every time. I make more money on it and get the same price for the product over the counter; it is as good a drink, and he cannot tell the difference from the Coca-Cola. I

will bet you I can go to the fountain and you cannot tell the difference. If he asked for Coca-Cola and I served him Dope, he would not know the difference. I guess that is very nearly true of every customer. * * * A few I do not tell and a few I do. I do not get outside and tell it you know. I handle these other products because they are cheaper."

T. H. LEVER, drug business at Columbia formerly, now at Spartanburg, S. C., testified for the Koke Companies as follows:

1237 "I do not remember the name of the Sizemore product; I do not know that even if it had a name. If I was at the soda fountain and a man called for dope I would not necessarily think that he wanted Coca-Cola, and I gave the drink there was the bigger margin of profit in, a drink without a name. That was the only drink similar
1238 to Coca-Cola. * * * Prior to the time we handled this Sizemore's drink, and a man asked for dope, I gave
1239 him Coca-Cola as a rule. * * * After I became acquainted with a good many people at the K-W-N and they called for dope, I served Coca-Cola because I had nothing else in the house. * * * I changed because the representative of the Koke and Dope Company
1240 showed me where it was a legal syrup, a legal proposition that I could handle it through legal channels. Naturally, it was one dollar a gallon, a little more of a bargain to the drug store, and I handled it for that reason, and the reason that they had the words 'koke' and 'dope' copyrighted. This representative of the Koke Company showed me a sample of the syrup. He did not tell me that when 'Koke' and 'Dope' were called for I had to sell their drink. He said, 'Here is a syrup you can make a larger margin of profit on than any other drink you

handle, as for instance Coca-Cola.' * * * I have had
1241 people say they could tell the difference in Koke and
Dope and Coca-Cola, and I would just set them out and
say, 'Can you see the difference in these two drinks?
Taste them,' and as a general thing some say they can
and some say they cannot. * * * Up to June I had
never handled any drink that was similar in appearance
to Coca-Cola. I had two separate containers because
they were separate drinks. I used it (Dope) at the soda
fountain just the same as I used any other drink. I
bought it and was buying it under this name and I used
it under this name, sold it under the name."

In the following instances bottled Koke was passed off
without comment in response to requests for Coca-Cola:

Name of Witness	Date	Record Page	Place	Name	City	State
Clarence J. Hogan and		648	Cafe	Tranchina	New Orleans, La.	
B. J. Gillon		659	"	"	"	"
"		660	"	Bob Kitchens	"	"
"		660	Saloon	Wendt	"	"
"	4-24-13	660	"	"	"	"
"	4-27-13	660	Cafe	Tranchina	"	"
"	4-27-13	660	Saloon	Bob Kitchens	"	"
"	4-26-13	660	"	Shepherd	"	"
"	4-23-13	660	"	Wendt	"	"
Frank J. Bogner	5-7-13	651	"	Springer	"	"
"	5-3-13	651	"	Bauman	"	"
"	5-3-13	651	"	Gimilli	"	"
"	5-2-13	651	"	"	"	"
"	5-8-13	651	"	Bauman	"	"
"	5-7-13	651	"	Bauman	"	"
"		651	Cafe	Martin	"	"
"		651	"	"	"	"
"	4-30-13	651	"	Curbers	"	"
"	7-11-13	652	Saloon	Curran	"	"
"	5-8-13	652	"	Springer	"	"
"	5-6-13	652	"	"	"	"
"	5-6-13	652	Cafe	Martin	"	"
"	7-9-13	652	Saloon	Curran	"	"
"	5-1-13	652	"	Gimilli	"	"
"	5-1-13	652	"	J. W. Lotz	"	"
"	4-30-13	652	"	"	"	"
"	5-5-13	652	"	"	"	"
"	7-10-13	652	"	Curran	"	"
George H. Wilkins		867	Grocery	Clarke	"	"
"		867	Saloon	Comus	"	"
"		867	"	"	"	"
"		874	Grocery	Sanitary Co.	Ft. Worth, Texas	
"		874	Park	Trinity Park	"	"
"				(Frank Ford)		
"		874	"	Lake Erie Park	Handley	"
"				(Tom Bunch)		
"		876	"	"	"	"

These bottles are in evidence as Plaintiff's Exhibits 111-151.

SCHEDULE VII.

The Koke Companies started out deliberately to compete with the Coca-Cola Company and with Coca-Cola. Their organizer (W. McCarty Moore) knew that Koke and Dope were familiarly used nicknames for Coca-Cola and to the public meant Coca-Cola. The representatives of the Koke Companies traded on this fact and further imitated distinctive Coca-Cola barrels, deliberately matched the color of them as closely as possible, purchased old Coca-Cola barrels as containers for the Koke Companies' product, deliberately imitated the Coca-Cola label, taking a specimen of it to a label maker as a copy, and the officers of the Koke Companies have admitted that they knew Koke and Dope were nicknames for Coca-Cola, that they traded on this fact and that they did not advertise because the Coca-Cola Company was making the market for them.

W. McCARTY MOORE, of Dallas, Texas, an incorporator of Southern Koke Company, Ltd., and other Koke Companies, and once president of the Southern Koke Company, Ltd., and the Koke Company of Texas, testified:

- 1738 "I had understood that there was a chemist who had
 formerly been with the Coca-Cola Company, or rather
 had formerly been a partner in the Coca-Cola business,
 who had been trying to compete with the Coca-Cola Com-
 1741 panies for years under various and sundry cola beverage
 names. I was president of the Koke Company of Texas.
 1751 * * * I had never been in the drug business or had
 any connection with the soft drink business of any sort
 prior to my connection with the Koke Company. I knew
 of the product Coca-Cola and had known it for quite a

long while. I knew it was well advertised and a popular drink, and I thought in getting into the Koke Company or going into the soft drink business was to compete with Coca-Cola. The Koke Company was known as a competitor of the Coca-Cola Company and Koke as a competitor of Coca-Cola. That was what I went into the business for.

- 1752 Q. Mr. Moore, had you ever heard anybody ask for Koke or use the word Koke at a soda fountain prior to that time? A. Yes, sir. If you want a specific case, I remember quite well at this same fountain of Smith Brothers at McKinney, where I bought a drink quite often, several times a day. I never did drink Coca-Cola and it was just due to the fact that I had a ticket possibly, I had one glass. I never could drink it because it unnerved me so; it was not a very palatable drink. I did not drink and I did not drink Koke very much. They were handling Coca-Cola and making Celery-Cola when any one called for that. At that fountain people asked for Koke. I could not say what was served to them in response to that request; it might have been Coca-Cola; I presume it was; it might have been some other cola beverage, I was not acquainted with the business and could not say. * * * I took those various labels to the printer and took the square label that Mr. Mayfield said he had been using at Shreveport. I took a Coca-Cola label, and I do not remember whether it was Dr. Pepper's label or Jersey Creme; I think it was one, possibly Dr. Pepper, or it might have been Pepsin. I think I had some three or four labels. I am right sure I had a Gay-Ola label, if I am not mistaken; that I won't be positive about, but I know two that I had positively, and that
- 1754 was the square label of Mr. Mayfield's; it had Koke on it in script, and the Coca-Cola label, and I think a Jersey Creme label. I discussed with him the advisability of a

square label or a diamond label. The printer followed the Coca-Cola label out more closely in the Koke label than he did follow the Mayfield label. If we had made an exact facsimile label at the time, using the word Koke on it, I for myself would not have felt I was doing it for the purpose of any infringement or deception. I here acknowledge and state I had no experience whatever. I was advised I had the right to use the name Koke. I presume the question was discussed at the interview we had with counsel, that Koke was used by the public as an abbreviation for Coca-Cola. I am pretty sure we discussed mighty near everything that was possible to discuss regarding it. I know I went very carefully into it and discussed every possible phase of it. We were advised we had no right to sell our product as and for Coca-Cola when Coca-Cola was asked for, of course, and vice versa that they had no right to sell Coca-Cola when Koke was called for. I was advised that Koke had been registered and that registration gave us the exclusive right. The Koke Company had the right to use it as applicable to the product it was marketing under that name.

1756 The registration gave that right. * * * I would just as soon put it out under some other name; I could have done better, I guess. Perhaps it would have avoided suits that we have had brought against us and possibly confusion which has existed between Koke and Coca-Cola.”

JAMES L. WRIGHT, of New Orleans, once president and secretary of the Southern Koke Company, Ltd., testified as follows:

1510 “I was connected with the Southern Koke Company, Limited of New Orleans. Mr. Moore came to New Orleans in the latter part of 1911. Moore was formally installed as president, I as vice president, and Mr. Scott

as secretary-treasurer. I have a total of twenty-five hundred shares of stock in my name. I later became president of the Koke Company.

1514 * * * My understanding of the adoption of the word Koke was that there were frequent demands, or calls rather on the part of buyers of the various soft drinks for Koke and Dope, and similar terms, and that the word Koke was adopted to take advantage of that demand.

That was my understanding of the adoption of the word, I was told that the word Koke had been copyrighted by a manufacturer of a similar soft drink in Tennessee or Kentucky, up there somewhere, and this copyright on the name was purchased by Mr. Mayfield or his associates. I believe I am a defendant in this case."

1515

JOHN CAIN (Rec., 622), testified that he was salesman for the Southern Koke Company of New Orleans, about April, 1913, calling on barrooms, grocers and confectioners. He was instructed by Mr. Scott how to approach the trade:

623 "Mr. Scott instructed me to go out and sell the stuff—sell the 'Koke' on these instructions—I could go out and sell the 'Koke' the same as I could 'Coca-Cola'; and he gave me the formula or affidavit, that the formula was the same as the 'Coca-Cola,' and tell them it was the same as 'Coca-Cola,' and for me to go out and sell it and tell the trade that they could sell the 'Koke' the same as if it were 'Coca-Cola.' He told me there was very little difference in the label—the only difference being that 'Southern Koke Company' was on one and the other had 'Coca-Cola' on it—the labels was the same—you couldn't tell the difference except by close inspection. * * * I sold 'Koke,' I guess, about two months.

625 * * * I told them they could sell it and the trade

wouldn't know the difference whether it was 'Koke' or
627 'Coca-Cola. * * * To go back over the story: Yes, sir; I told those men Mr. Scott employed me as a salesman and told me to go out and sell it to the trade as 'Coca-Cola.' Yes, sir; that it was like 'Coca-Cola' in taste, that it was made by the same formula. Yes, sir; that the label was the same, and that nobody could tell
628 the difference only by close inspection. * * * I told him I was selling 'Koke,' that it was made out of the same formula, but that it was to be sold for 'Coca-Cola' and couldn't be told from it."

C. H. WHITTLE (Rec., 634), a former salesman of the Southern Koke Company, Ltd., of New Orleans, testified:

634 "I went out soliciting orders for Mr. Scott. I received instructions from Mr. Scott as to how to solicit orders. He came to me one day and asked would I go out and
635 help Mr. Cheevers in getting customers for his 'Koke,' when they had the bottling department going, and I went out with Mr. Cheevers and got from thirty to forty one day, and the next day I got quite a number of customers for him, I don't know exactly. Well, I used a great many arguments to the trade in selling 'Koke'; one I used was that the Coca-Cola people had put up money for prohibition—a million dollars, so I was told by Mr. Scott—and several other things. He told me that the Koke people was the originators of 'Coca-Cola,' and a man by the name of Pemberton, he died and they beat his wife out of it in the courts; that's what Mr. Scott told me. You ask what arguments I used to the trade to sell it; well, when I sold 'Koke' I told them it was 'Coca-Cola'—just the same, not a bit different; they couldn't tell it by taking a bottle of each and drinking it. * * * I sold it as 'Coca-Cola,' not as 'Koke,' no sir,—not all the time, at

times when people asked me for 'Coca-Cola' I told them to take 'Koke'; if they asked me was it 'Coca-Cola,' I told them yes. * * * I was bartender in that saloon at that time. No, sir, I did not sell it to my customers as 'Coca-Cola.' I sold it as 'Koke' and as 'Coca-Cola,' and sold it when people came in and asked for 'Coca-Cola' I
 636 would give them 'Koke.' * * * When Scott sent me out he didn't exactly tell me to sell it as 'Coca-Cola,' but he told me to say anything so I sold it. As long as I sold it he didn't care. He put it in pretty near that exact language. He told me he didn't care how I sold it, so I sold it. You ask won't I swear one way or the other—did Mr. Scott tell me to sell that stuff as 'Coca-Cola'; he told me to sell it any way. I felt like selling it, as long as I sold it. You again ask me if Mr. Scott told me to sell that stuff as 'Coca-Cola'; he told me to sell it any way I could sell it—it didn't make no difference to him how I sold it, so I sold it. You ask me for the third time if Mr. Scott told me to sell that stuff as 'Coca-Cola'; he didn't make any exact assertion on it at times; at certain times he did. He told me plump and plain to say it was 'Coca-Cola' if I could sell it that way. Yes, as 'Koke' and as 'Coca-Cola,' if I could sell it that way. You again ask me if I am certain that Mr. Scott told me to sell 'Koke' to the dealers as 'Coca-Cola'; I answer, yes."

W. J. CHEEVERS (Rec., 588), connected with the Southern Koke Company, Ltd., of New Orleans, from October, 1912, until three weeks after the death of Mr. Scott, which was May 29, 1913:

588 "Mr. Scott was vice-president and general manager.
 589 I was a member of the board of directors. * * * You ask if I ever had any discussion with Mr. Scott in regard to 'Coca-Cola' and 'Koke'; well, we had innumerable discussions. I can't say just right off, any particular one,

but we had so many—for instance, there was one where I spoke to him about the unfairness of the business that he was going into and his wife tried to dissuade him from going into it. I asked him if he didn't think it was unfair to be trading on the advertisements and money spent by another concern, and he said he did; that he got into the thing over in Texas, wherever he had met those folks, the Koke Company of America—and they had taken him around, he had been at different soda fountains, and he found whenever a man wanted 'Coca-Cola' he would invariably ask for 'koke' and he saw the value of that as a chance to make money. When I first started out as a city salesman, Mr. Scott furnished me with an affidavit signed by Mrs. Pemberton—she was the widow,
590 I believe, of the original owner of 'Coca-Cola'—in which she stated that Mr. Mayfield was familiar with and knew the original formula of 'Coca-Cola' and was qualified, in her opinion, to manufacture it—something to that effect—if you have one here I will identify it. Mr. Scott told me the only difference between 'Coca-Cola' and 'Koke' is a slight percentage of celery, which was added to cover the patent or copyright laws. Yes, sir; I am familiar with the time that they first commenced bottling the product that they called 'Koke.' This bottle was not labeled. I told Mr. Scott that the bartenders generally,—the trade generally—they were complaining about the bottle not being labeled because there was not similarity between that and the Coca-Cola bottles; Mr. Scott said he would order labels and asked me if I would go with him to Houser's printing office—the legal printers. I went with him and we met Mr. Speyer there. Mr. Scott had the cuts, I suppose there were about a dozen, and he told him he wanted him to make him up 50,000 labels like that—said that he wanted them about the color of the 'Coca-Cola' label. A question arose about the color

of the background, whether it was purple or black. My idea was that the inset,—the ‘Coca-Cola’ inset,—was red, always, for some reason or other. I said that to Mr. Scott. He said, ‘Well, you get a bottle from the corner; buy a bottle of “Coca-Cola” and bring over here and we will see.’ So I brought it back and Mr. Speyer and Mr. Scott and all agreed that the color of the ‘Coca-Cola’
591 label was a dark purple or a dark blue—anyhow they agreed on the color, that was the color that he wanted, and he told him to make him up 50,000, I think, to simulate the ‘Coca-Cola’ color. Yes, sir; those labels were delivered. Plaintiff’s Exhibit No. 105 is the label referred to. * * * You ask if I was ever in there when they had any ‘Coca-Cola’; when they made up the first batch of ‘Koke.’ Young Mayfield had a bottle of ‘Coca-Cola’ syrup. The following day—I think it was the next day—Mr. Scott mixed some of this ‘Coca-Cola’ syrup—the ‘Koke’ wasn’t then ready, and we had it to drink; and I asked him the purpose of having the ‘Coca-Cola’ syrup and asked him why he had sent out and purchased ‘Coca-Cola’ syrup. Young Mr. Mayfield said it was for the purpose of testing, and I presumed that was to get the weight and the body and the color to make comparisons
602 between ‘Coca-Cola’ and ‘Koke.’ * * * Then came the discussion of making the label. I mentioned that the trade, the bartenders, complained that there was no label; that they wanted a label so it would look similar to ‘Coca-Cola’ packages; that was the object; that’s what they
604 were working for. * * * XQ. 218. The object of the testimony you are giving, as you understand it, is to show that in your presence Scott and Speyer—the printer of Houser—had in their hands a bottle of ‘Coca-Cola,’ with this label, and that they were trying to get, in type and in color and in shape, a label as near as possible to the ‘Coca-Cola’ label; is that what you are trying to tell us?

A. That's Mr. Scott's orders, to get it as near like the
605 'Coca-Cola' label as possible. * * * I told the bar-
tenders whom I saw anything to effect a sale. Mr. Scott
was frequently with me when I effected a sale. No, sir; I
did not tell them it was 'Coca-Cola.' My first argument
was to patronize home industry, that this was bottled
here. Sometimes they would say, 'Well, you know the
folks want what they call for; they want "Coca-Cola," and
we can't put that across.' I told them then that the label
was the same and that the product was the same; that
it was made by Mr. Mayfield and I showed them this affi-
davit of Mr. Pemberton that I had, showing that he could
make the same syrup the Coca-Cola Company makes. You
ask if I then suggested to the barkeepers that they could
607 sell it; that was up to themselves. * * * He (Scott)
told his wife what I told you a while ago about the soda
fountains and the continuous calls for 'Koke'—instead
of giving them 'Coca-Cola' they would give them 'Koke'
—and all the money that there was in it. * * * Yes,
614 sir, I thought it was honest to take this stuff to the bar-
keepers, and tell them what I have been telling you, name-
ly, that the stuff tasted like 'Coca-Cola,' was the same as
'Coca-Cola,' was as good as 'Coca-Cola'; that there was
no label on the bottle—I showed them that the label looked
like the 'Coca-Cola'—also the thing on top and also that
the bottle looked like 'Coca-Cola.' You ask if, having
shown them all those things and having lead the horse
up to the water, I didn't ask them to drink. Oh, you bet
your life they always drank and Mr. Scott was right there
615 when I advanced my argument. * * * Mr. Scott
wanted me to go on the road in the very beginning and
I absolutely refused, and the only way he ever got me to
go out and sell 'Koke' was by telling me of the ill treat-
ment,—he told me the way they worked on the conscience
of everybody they wanted to work—that Mayfield had

been robbed by the people who finally purchased the 'Coca-Cola,' and this was doing no wrong to people who had robbed somebody else."

WILLIAM J. SPEYER, superintendent and vice-president of the Houser Printing Company of New Orleans, testified:

639 "Yes, sir, I recollect an interview I had in 1913 with Mr. Scott and a Mr. Cheevers, representing the Southern Koke Company of New Orleans. Mr. Scott came in and asked about having some cuts made or having some labels made, and I didn't have the cuts present here, and, about two days afterwards, they brought the cuts in with Mr. Cheevers and they wanted the colors of ink, something similar to the colors used on 'Coca-Cola' bottles; well, I didn't know what that was, and Mr. Cheevers went out and brought a bottle for me to see the color of the ink. I used a color of ink as near as possible to that—a kind of blue black. Yes, sir; Mr. Cheevers went out and got a bottle from the saloon and brought it back."¹

M. D. PALMER (Rec., 577), a representative of the Sherwin-Williams Company, of New Orleans, in the paint and varnish business, testified:

577 "I went to the Southern Koke Company's place of business on Howard street near Carondelet and I saw Mr. Scott, who was manager then of the Southern Koke Company. I spoke to him in regard to buying paint and he referred me to the gentleman in the back, who had charge of the painting of the barrels. I went back to see if I could secure some business from him and sold him five gallons of paint. Plaintiff's Exhibit No. 104 is a paper which shows that he bought five gallons of red

¹The order for these labels and an impression of the cut were identified by this witness and are in evidence Exhibits 106-110.

paint. My company shipped this paint to the Southern Koke Company, which concern used one gallon of it and shipped the other four gallons back. I went around to see what the trouble was and it seems that the paint was
578 not the exact shade he wanted. He thought after it went on barrels it would come out a better shade than it did. He just wanted to know if he could get a red as near the 'Coca-Cola Red' as possible. About that time I went to see Mr. Freeman of the Louisiana Coca-Cola people and asked him in regard to the paint they were using and he advised me not to have any dealing with them whatsoever in regard to getting paint as near that shade as possible, that they had a patent on it and their paint was known as the 'Coca-Cola Red.' After that I had no further dealings with the Southern Koke Company."

A. B. FREEMAN (Rec., 641), of New Orleans, Secretary and Treasurer of The Louisiana Coca-Cola Bottling Company, testified:

641 "I had a conversation in regard to the paint used on 'Coca-Cola' barrels with Mr. Palmer. He came to my office—I had known him for sometime—and asked me if I could find out, or would find out, for him the exact kind of paint used by the Coca-Cola Company for painting its barrels. I told him I would gladly do so, and he volunteered the information that he wanted to get it for a new concern just starting up in town and putting out a syrup—the Koke Company—who wanted to paint their barrels identically the same color, and would use that paint if he could get it. I told him I would get the information for him, but that I was afraid he couldn't use it, and I showed him one of the printed decisions in the
642 'Gay-Ola' case that I happened to have in my desk. He thanked me for the information and said he would go on away."

FRANK P. KILLILEA (Rec., 678), of New Orleans, in the cooperage business:

678 "In the course of my business I have had talks with the Southern Koke Company but have never sold them any barrels. It must have been about sixteen or eighteen months ago, now—people representing these people came out to our place to buy these 'Coca-Cola' barrels and said that they only wanted to buy 'Coca-Cola' barrels and said they didn't want to buy any other barrels except 'Coca-Cola' barrels, half barrels or kegs. I went and told Mr. Freeman about it. * * * They said they had to have fresh barrels, didn't need to scrap them or anything else of the kind. They wanted me to pick them up and bring them to them every day that I could get them. * * * After looking over the matter, I decided not to sell them.'"¹

WILLIAM G. MANSFIELD, of Chicago, testified (Rec., 859), that he recalled answering advertisement in The Chicago Tribune,² about April a year ago. He received an answer from Mr. E. M. Boyd and called on him at the Palmer House:

859 "Mr. Boyd¹ told me that he had a formula exactly the same as that of 'Coca-Cola.' He told me he was selling eight per cent. cumulative preferred stock at par and was giving a bonus of common stock to the druggists who
860 dealt in his 'Koke,' which was a product manufactured by the Western Koke Company, which concern Mr. Boyd was representing. I then told him I thought there would

¹See Exhibit 154, card of Koke Co. of Texas offering to buy old Coca-Cola barrels.

²The advertisement is in evidence as Exhibit 167.

³This is the same Boyd referred to in the testimony of the witness Thomas (*ante*, 134). These statements are not denied. The Koke Companies gave notice that they would take Boyd's testimony but did not do so.

be quite a good deal of competition on account of his formula being the same as 'Coca-Cola'; but he argued that there would not, as he would not have to do any advertising and when a person comes into the drug store and asked for 'Coca-Cola' the druggist will give him 'Koke,' the customer not knowing the difference. * * *

861 Yes, sir; it surely is a fact that Mr. Boyd told me that druggists and dealers could sell this when people asked for 'Koke,' that the name of this product was 'Koke' and that when people asked for 'Koke' they could sell it as such. He told me that when a person came in and asked for 'Koke' after they got used to the name, of course, they would use it and sell it as such, and, also, 'Coca-Cola' when a customer came in. Yes, sir; I am certain he said that they could sell it when people asked for 'Coca-Cola.'

862 * * * You ask how it happened that Mr. Boyd unfolded to me this fraudulent scheme—me, an utter stranger; he was almost sure I would invest money in it."

H. G. McLEAN, Dallas, Texas, advertising solicitor for the Dallas News (Rec., 729):

730 "I called on the Koke Company of Texas to solicit an advertisement. * * * I met Mr. Van Winkle and at that time it was my intention to solicit him for a card for the jobbers and manufacturers' trade and we discussed advertising for a few minutes and Mr. Van Winkle told me that the Koke Company of Texas was not doing any advertising. He said they couldn't afford to advertise from the fact that they were selling, I believe he said, 'Koke'—I don't know if he mentioned the brand or not, it seems to me like it was 'Koke,' it may have been some other name—but that it was the same formula as 'Coca-Cola' and said that the 'Coca-Cola' people were advertising and it was generally known as 'Koke'; that is a large percentage of people would call for 'coke,'

and if the fountains were supplied with 'Koke' they could furnish him with this product and sell it or distribute it in that way. I believe that was the main reason. I didn't have any argument to offset that, consequently I never called on him any more."

GEORGE H. WILKINS (Rec., 863):

- 866 "I asked Mr. Mayfield if they were doing any advertising, and he said, 'No, I have spent several fortunes in advertising and now I am going to retrench. I am not going to do any advertising for "Koke." "Coca-Cola" has spent millions in advertising and every dollar they spend helps "Koke." ' I asked him how that was, and he said that lots of people asked for 'coke' when they meant 'Coca-Cola' but they could not help that; that the 'Coca-Cola' also sold their product as 'Koke' but that he would stop that later and that his bottle and label was the same as 'Coca-Cola' and lots of people thought it was 'Coca-Cola.' * * * I got into conversation with Mr. Nason
- 871 and, among other things, asked him how he was selling 'Koke.' He said, 'Well, lots of people ask for "coke" when they mean "Coca-Cola" and they do not know there is any such drink as "K-O-K-E." Of course, we can't stop that; if they want to do that we can't help it. We sell this product as "Koke," and, if they want to substitute it, that is their business.' I then asked him why there was such a demand for 'Koke.' He said, 'Well, lots of people ask for "Coca-Cola" as "coke" and "dope" and other names.' He said some other names, but I did not pay much attention. Mr. Nason was a salesman. * * *
- 880 I called on J. H. Van Deusen. I asked Mr. Van Deusen if it was not a fact that people asked for 'coke' when they wanted and meant 'Coca-Cola.' He said, yes, but then you couldn't help taking advantage of people when they didn't know any more than that."

No. 3012.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE KOKE COMPANY OF AMERICA, et als.,
vs. Appellants,
COCA-COLA COMPANY,
Appellee.

**Supplemental Brief for Coca-Cola Company,
Plaintiff-Appellee.**

WILLIAM K. WHITE,
HAROLD HIRSCH,
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Solicitors and of Counsel for Plaintiff-Appellee.

Filed this.....day of May, A. D. 1918.

F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THE KOKE COMPANY OF AMER-	} <i>Appellants;</i>	No. 3012
ICA, et als.,		
VS.		
COCA-COLA COMPANY,	} <i>Appellee.</i>	

SUPPLEMENTAL BRIEF FOR COCA-COLA COM-
PANY, PLAINTIFF-APPELLEE.

THIS IS A CASE OF FACT.

This case is here solely on questions of fact. The facts, after a careful and painstaking examination and an extended trial, have all been found in plaintiff's favor by the Court below in its opinion and decree (235 Fed., 408; Brief Appendix I, p. 141, and Appendix II, p. 153).

In addition, the same facts on the same record, in a separate proceeding between plaintiff, defendant Southern Koke Company, Ltd., and J. C. Mayfield, who is the alleged source of all the pretended rights of all the defendants here, to the subject matter of this controversy, have been independently found in plain-

tiff's favor, after full argument and consideration by the District Court for the Southern District of Louisiana. (Brief Appendix II, p. 156.)

The same facts, with respect to the misuse of the abbreviation Koke of plaintiff's trade-mark Coca Cola, have also been found, after full examination and consideration, in plaintiff's favor by the two tribunals of the Patent Office in a proceeding between the plaintiff and defendant Koke Company of America upon the same record before this court (only a portion, however, of its testimony was printed by the Koke Company of America). The Koke Company appealed to the Court of Appeals of the District of Columbia. This case is now finally disposed of by the action of the Court in dismissing the appeal.

Four different tribunals, therefore, upon the record here before the Court, after independent investigation, have come to the same conclusion on matters of fact.

This is a proper case for the application of the rule announced by the Supreme Court in *Adamson v. Gililand*, 242 U. S., 350, 353, and by this Court in *Central California Canneries Co. v. Dunkley Co.*, 247 Fed., 790, 794.

The attack on the validity of plaintiff's trade-mark Coca Cola involves only a question of fact, for the alleged invalidity is predicated on its asserted deceptiveness. The Court below found the trade-mark valid and overruled defendants' contentions as not estab-

lished by the evidence, a good portion of which, on defendants' behalf, was heard in open court.

This same conclusion, on the same record, was reached by the District Court in Louisiana.

The Circuit Court of Appeals of the Sixth Circuit overruled the same contentions made here and held Coca Cola to be a valid trade-mark and not deceptive in *Coca Cola Co. v. Nashville Syrup Co.*, 200 Fed., 107; 215 Fed., 942.

The validity of plaintiff's trade-mark was again sustained by the Circuit Court of Appeals of the Eighth Circuit in *Coca Cola Co. v. Bennett*, 238 Fed., 513.

Numerous Districts Courts have come to the same conclusion. (See original Brief 38 and page 13 of this brief.)

The name Coca Cola has also been registered as a trade-mark under the two Federal Trade-Mark Statutes and under their terms is *prima facie* valid.

The defendants, therefore, on these questions of fact must, it seems to us, urge something more than mere dissent.

INACCURACIES IN DEFENDANTS' BRIEF.

There are a number of inaccuracies in defendants' brief. Attention can be called specifically only to a few. On page 15 it is said:

"After plaintiff had taken all of its testimony in chief, and after defendants had begun to take

their testimony, plaintiff applied for leave to amend its bill" (Rec., 112).

The facts are shown in the record at pages 142 and 150. The amendment was prepared and served on counsel the day after plaintiff began taking evidence (July 28, 1914). Formal motion for leave to amend was made on August 17, 1914, and granted on February 17, 1915. (Rec., 153.) The statement that plaintiff asked leave to amend because it "was surprised by the testimony of its own witnesses" (Brief, 18) and repeated on page 19, is an utterly gratuitous assumption not borne out by the facts. There is a significant absence of any reference to any page of the record as supporting either this assertion or the further statement that "witnesses' written statements were read into the record verbatim as testimony." There would be no objection to such practice, even if the statement were true. (*Samuel v. Hostetter*, 118 Fed., 257, 259.) Granting plaintiff leave to amend is assigned as error by defendants.

The allowance of such an amendment is a matter of course under Equity Rules 19 and 28, and being the discretionary act of the Court below, is not reviewable on appeal.

Slicer v. Bank of Pittsburg, 16 How., 571, 578;

Kennon v. Gilmer, 131 U. S., 22;

McFaul v. Ramsey, 20 How. (61 U. S.), 523;

Kerr v. Clampitt, 95 U. S., 188;

Railway Co. v. Heck, 102 U. S., 120;
Roemer v. Bernheim, 132 U. S., 103;
Fitzgerald v. Fitzgerald, 137 U. S., 98;
Milwaukee & Minnesota R. R. Co. v. Soutter,
 154 U. S., 540;
Credits Commutation Co. v. United States, 177
 U. S., 311;
Williams v. Cable, 219 Fed., 663;
 4 *Corpus Juris*, 796-799;
Moore v. Thompson, 138 Cal., 23; 70 Pac.,
 930;
Scholle v. Finnell, 167 Cal., 90; 138 Pac., 746,
 751.

On page 44 the statement, concerning Judge Foster's disposition of the case against the defendant, Southern Koke Co. Ltd., at New Orleans, is erroneous. The inference sought to be conveyed is that Judge Foster entered merely a *pro forma* order. The case was set for trial on the motion of defendants' counsel and was vigorously argued, fully briefed, and decided independently by the Court on its merits. There was no understanding that the decree against defendants there was to remain interlocutory pending the decision of this Court. The case now stands awaiting an accounting of damages from the defendants. The decree is printed as Appendix III to original brief (p. 156).

On page 44, a quotation of a single paragraph from the Commissioner of Patents' opinion is given, which, without the context, is misleading. The whole opin-

ion is printed in Appendix V to the original brief (p. 180), where, what the Commissioner did find, appears.

Coca Cola Company v. Henry A. Rucker was a suit brought by plaintiff about 1902 to recover payments of taxes under the Spanish War Revenue Act of 1898, which were levied on the claim that Coca Cola was a patent medicine. It was held (117 Fed., 1006; 56 C. C. A., 248, and 125 Fed., 1004) that Coca Cola was not so taxable.

A printed transcript of the record in this case was offered in evidence by defendants at the trial below (Rec., 2501). It was objected to and the objection was sustained by the Court (Rec., 2501). No error is assigned to this action of the District Court, as required by Rule 11, and it is not mentioned in the specifications of error in the brief, as required by Rule 24-2-b. (*Doe v. Waterloo Mining Co.*, 70 Fed., 455; *Connell v. Diederichsen*, 213 Fed., 737, 740.)

The copious quotations in defendants' brief from what counsel calls the "Rucker record" are, therefore, somewhat surprising and are manifestly improper.

Extended quotations from the "Rucker record" are printed on the following pages of defendants' brief: 118, 120, 125, 144, 152, 154, 155, 156, 157, 158, 159, 160, 161, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 187, 197, 198, 199, 200, 201, 206, 224, 226, 227.

Other extended quotations, which are not found in

the record in this case, appear on pages 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 126, 127, 128, 129, 133, 134, 136, 137, 146, 147, 169, 170, 171, 184, 204, 256, 257. These are alleged quotations from scientific books and dictionaries not in evidence. The purported quotations from testimony of Kent and Closter, 138, 139, 140, 201, and Robinson, 173, are from a Patent Office Interference disposed of twenty-five years ago. The testimony was not given in this case. The quotations from the testimony of Fuller, on pages 183, 210 (last paragraph), and on pages 211, 225, 226, 229, 230, 231, 245, 249, 250, are from his testimony in *U. S. v. 40 Bbls. & 20 Kegs of Coca Cola*.

The purported quotation from Asa G. Candler, p. 187, is from the testimony of John D. Fletcher, and is a quotation not from testimony given here, but from an affidavit in *Coca Cola Co. v. Nashville Syrup Co.*

In all, about fifty-five pages of defendants' brief are thus made up. The contention, which will be discussed later, that plaintiff does not come into court with clean hands, seems to be based largely on this matter which is outside the record in this case.

No record pages are cited as authority for the statements under the caption, "The Rule Applied," on page 46, and following of defendants' brief. Possibly the Rucker record or some other extraneous document purports to be their source. There certainly is nothing in the record in this case which could serve as a basis for these assertions.

RES JUDICATA.

With respect to the misuse of the abbreviation Koke of plaintiff's trade-mark Coca-Cola in a proceeding brought by this plaintiff against the defendant Koke Company of America in the Patent Office under Section 6 of the Act of February 20, 1905, on the same testimony here before the court (but not all printed by the defendant) and raising the same issue, the Examiner of Interferences held for plaintiff, refused the registration applied for by the Koke Company, holding that it had no right either to register or use the word Koke because it was an unlawful attempt to appropriate a nick-name long used by the public to designate Coca-Cola. This decision was affirmed by the Commissioner of Patents and on January 5, 1918, the appeal, taken by the Koke Company to the Court of Appeals of the District of Columbia, was dismissed on the Court's motion for non-compliance with the rules relating to printing. These decisions are printed as appendices IV and V to the original brief for the plaintiff. The decision thereupon became final and the controversy, as far as it concerns the word Koke, was concluded.

All the elements of *Res Judicata* exist.

The parties are the same, the controversy is the same, the facts are the same. This matter was duly called to the Court's attention in a petition filed by

appellee on May 7, 1918, following the practice sanctioned by the Supreme Court in

The Hart Steel Co. v. The Railroad Supply Co., 244 U. S., 294.

As was said by Mr. Justice Harlan in *Southern Pacific R. R. v. United States*, 168 U. S., 1, 48:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked, for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

"Among the cases in this court that illustrate the general rule are *Hopkins v. Lee*, 6 Wheat., 109, 113; *Smith v. Kernochen*, 7 How., 198, 216; *Thompson v. Roberts*, 24 How., 233, 240; *Washington, Alexandria & Georgetown Steam Packet Co. v. Sickles*, 24 How., 333, 340, 341, 343; *Rus-*

sell v. Place, 94 U. S., 606, 608; *Cromwell v. Sac County*, 94 U. S., 351; *Campbell v. Rankin*, 99 U. S., 261; *Lumber Co. v. Buchtel*, 101 U. S., 638; *Bissell v. Spring Valley Township*, 124 U. S., 225, 230; and *Johnson Co. v. Wharton*, 152 U. S., 252."

It is a well-established rule that a decree by a court of competent jurisdiction concludes the parties and their privies in a subsequent suit as to all questions of law or fact which were necessarily litigated and determined.

Cromwell v. County of Sac, 94 U. S., 351;
Johnson Co. v. Wharton, 152 U. S., 252, 258;
D'Arcy v. Staples & Hanford Co., 161 Fed.,
 733.

These rules apply in trade-mark and unfair competition cases. (38 Cyc., 907.)

The demands and subject-matter in this case, in so far as concerns the abbreviation Koke of plaintiff's trade name Coca-Cola, are identical with those in the Patent Office proceedings. As was said by Mr. Justice Story in *Lawrence v. Vernon*, 3 Sumn., 20; Fed. Cas., 8146, and cited with approval in *Empire Nail Co. v. American Solid Leather Button Co.*, 71 Fed., 588, the test is "whether the same evidence will support both actions."

And in these cases by stipulation and order the evidence is in fact the same.

The principle here contended for as to the finality of the decision of the Patent Office is in accord not

only with the well-established doctrine with regard to the findings of the Interstate Commerce Commission, but also with regard to the findings of other administrative officers of the Government.

Maxwell Land Grant Case, 121 U. S., 325.

The acts and decisions of administrative officers in the discretion delegated by Congress have been held to be conclusive. In *Butterfield v. Stranhan*, 192 U. S., 470, the decision of the Secretary of the Treasury as to the standard of teas to be imported was held to be not subject to judicial review. In the bridge cases, *Union Bridge Co. v. U. S.*, 204 U. S., 364; *Monongahela Bridge Co. v. U. S.*, 216 U. S., 177; *Hannibal Bridge Co. v. U. S.*, 221 U. S., 194, it was held that the decision of the Secretary of War as to the reasonableness or unreasonableness of the obstruction of navigation was conclusive on the courts in the absence of proof that the Secretary had acted in an arbitrary or unreasonable manner.

THE DEFENSE OF UNCLEAN HANDS.

Defendants in the brief filed in their behalf seem studiously to avoid reference to the facts in this case, but spend the first two hundred and ninety-one pages in a labored discussion of asserted unclean hands on the part of complainant, accompanied with copious quotations from certain old advertisements, not issued

since about 1902,¹ and what is called the Rucker record—not the record in this case. The relevancy of either is not apparent. The so-called Rucker record purports to be a transcript of testimony taken in a revenue case sixteen years ago, offered in the court below, excluded and no error assigned. (Rec. 2501). The advertisements, innocent in themselves, were discontinued over fifteen years ago. Defendants' infringement complained of in this case began in 1909.

COCA-COLA IS A VALID TRADE-MARK AND NOT DECEPTIVE
AND THE PRODUCT IS A HARMLESS DRINK.

The name "Coca-Cola" is then asserted by defendants to be a misdescription of plaintiff's product. The short answer to this is that Coca-Cola is an arbitrary name and is not a description at all. It is a registered trade mark under the Federal Law, uncanceled and unattacked. It has repeatedly been held a valid trade-mark by the courts.

¹ The defense of unclean hands cannot be predicated upon statements discontinued prior to suit.

Moxie Co. vs. Modox, 153 Fed. 487, 489; 162 Fed. 649.

Johnson & Johnson v. Seabury, 61 Atl. 5; 69 N. J. Eq. 696; 67 Atl. 36; 71 N. J. Eq. 750.

Symonds v. Jones, 82 Me. 202; 19 Atl. 820, 823.

Siegert v. Gandolfi, 149 Fed. 100.

Peoria Gas & Electric Co. vs. Peoria, 200 U. S. 48.

Employing Printers Club v. Dr. Blosser Co., 122 Ga. 509; 50 S. E. 353; 69 L. R. A. 90.

Clark Thread Co. v. Armitage, 67 Fed. 896, 899.

Pillsbury v. Pillsbury, 64 Fed. 841, 850.

Broder v. Zeno Mauvais Music Co., 88 Fed. 74, 79.

Beecham v. Jacobs, 159 Fed. 129, 131; 221 U. S. 263.

Keeley v. Hargreaves, 236 Ill. 316; 86 N. E. 132.

- Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 107; 215 Fed., 942;
Coca-Cola Co. v. Bennett, 238 Fed., 513;
Coca-Cola Co. v. Butler, 229 Fed., 224;
Coca-Cola Co. v. Duberstein, U. S. D. C., Southern District Ohio, March 19, 1918 (not yet reported) ;
Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720; 211 Fed., 942;
Coca-Cola Co. v. American Druggists Syndicate, 200 Fed., 107;
Coca-Cola Co. v. Deacon Brown Bottling Co., 200 Fed., 105;
Coca-Cola Co. v. Virginia Syrup Co., 3 Trade Mark Reporter, 125.

Counsel's discussion of the alleged unclean hands by reason of the asserted fact that the word Coca-Cola is deceptive is nothing but a tedious repetition of what has been urged in other cases involving this mark and invariably dismissed as of no consequence.

- Coca-Cola Co. v. Nashville Syrup Co.*, 200 Fed., 153; 215 Fed. 527;
Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720; 211 Fed., 942.

The difficulty with the unclean hands defense is that what it is sought to be based upon is not true as a matter of fact, and was so found from the evidence by the Court below (Rec., 239).

It is intimated that there is cocaine in Coca-Cola. This is not true. Coca-Cola does not contain any cocaine. Charles E. Caspari (Rec., 902), John A. Wesener (Rec., 923). In the proceedings brought by the Government under the Food Act, *U. S. v. 40 Barrels and 20 Kegs of Coca-Cola* (241 U. S., 265), it was not even asserted that Coca-Cola had any cocaine in it.

It is then insinuated that the name "Coca-Cola" is misleading. It is not deceptive, because Coca-Cola does in fact contain extracts derived from coca leaves and cola nuts. This is shown by the testimony not only of chemists, who detected these substances on analysis (H. B. Fuller, Rec., 2360, 2361, 2369), but the testimony of chemists and others who have actually seen the substances extracted from the cola nut and the coca leaves put in the product in the course of manufacture. Charles E. Caspari (Rec., 905), John A. Wesener (Rec., 924), C. H. Candler (Rec., 444).

It is then asserted that even if present, these extracts do not have any effect on the product, but this contention is completely negated by the proofs. Dr. Fuller says (Rec., 2319): "The flavor of 'Coca-Cola' syrup is not the flavor of any one thing. It is a very peculiar blend in which no one thing sticks out more than anything else."

Dr. Caspari says (Rec., 914): "That is what you have in Coca-Cola. You have a blend of various ingredients, and no single one predominates."

Dr. Wesener, speaking of the extractives (Rec., 929, 930): "It gives character to the drink which without it, it would not have." And Dr. Fuller says (Rec., 2368-9): "It would unquestionably act as a blend and the blend would produce the very pleasant flavor that Coca-Cola has."

Coca-Cola is not a medicine, it is a harmless soda fountain beverage. People drink it because they like its taste. This taste is distinctive and is a blend of many flavors, all contributing to the whole.

Among the ingredients in Coca-Cola are extractives from the cola nut and the coca leaf. The syrup with these extracts has a taste different from a syrup made without them. (Caspari, Rec., 915; Wesener, Rec., 929, 930).

Opposing counsel complain that these extractives are small in quantity. As stated above, this product is not sold as a medicine (*Coca-Cola Co. v. Rucker*, 125 Fed., 1004), but as a beverage, an acidulated and flavored syrup, like all syrups, composed largely of sugar, containing among other things essential oils, extractives from cola nuts and coca leaves mixed with carbonated water to make a soda fountain drink. There is a small amount of caffeine in Coca-Cola, less than in tea or coffee. It is not injurious to health (Rec., 924). There is no testimony the other way. We do not understand that there is any dispute on this point.

Taste is a subtle thing. Physiologists and psycholo-

gists know little about it. Taste is a thing which cannot be disputed. It is not a matter to be determined by a quantitative analysis. Perfumes, odors, sauces, flavors, like mixtures of tobacco and blends of liquors, are all complex combinations of many ingredients. Any variation may completely alter the result. Coca-Cola has, among other ingredients, extractives from cola nuts and cola leaves in it. These extractives, whatever their quantity, contribute to the distinctive flavor which Coca-Cola has and which the public likes. The name is truthful in its suggestion, if it can be said to carry any.

THE INCONSISTENCY OF THE DEFENSES.

In this case the defendants have been driven from one defense to another. The defense first was that Koke and Dope were defendants' lawful trade marks and that their use was earlier than as nicknames for Coca-Cola. This contention was clearly fabricated and when this little journey into fiction was exposed and condemned, of course other defenses had to be found or defeat acknowledged, so they were forthcoming. Then it was urged that the words Koke and Dope, which previously defendants claimed to own exclusively, were the common property of everyone. This is still advanced, but is subordinated to the defense of unclean hands. Having unsuccessfully experimented with fictitious anticipation and the common to the trade defense, defendants seize upon

the doctrine of unclean hands as an afterthought, attempt to sustain it in part by purported extracts from the so-called Rucker record which was excluded below, and by multiplying language consume 291 pages in the citation of perfectly sound, but utterly inapplicable, cases.

We have in this case the edifying spectacle of a pirate attacking the merit of the very product he imitates and attempting to blacken by cries of unclean the identical good will he is using his best endeavors to steal.

This Court effectually disposed of such a contention in *Samuels v. Hostetter*, 118 Fed., 257, where Judge Gilbert said (260) :

“The argument that it is a quack medicine, and that it is injurious to the human system, and is contraindicated for some of the ailments which it purports to cure, comes with ill grace from those who imitate it as closely as they may without possessing a complete knowledge of its formula, and by unfair trade sell the simulated articles as and for the genuine.”

COCA-COLA IS NOT MISBRANDED.

Much is said in defendants' brief (p. 235) as to the effect of the decision in *United States v. Forty Barrels and Twenty Kegs of Coca-Cola*, 191 Fed., 431; 241 U. S., 265, and it is insisted that the decision of the Supreme Court is conclusive against the validity of the registered trade mark Coca-Cola and establishes

the fact of adulteration and misbranding of Coca-Cola so as to prevent protection of that term as a trade mark or against the assaults of unfair competition. The lower court (191 Fed., 431) held that caffeine was an element always present in Coca-Cola and hence was not an added ingredient within the meaning of the Food and Drugs Act (191 Fed., 436). The lower court did not pass upon or permit the jury to pass upon the questions as to whether the name Coca-Cola suggested and represented the presence of coca or whether there was cola or whether caffeine was a deleterious or poisonous ingredient. The Supreme Court disagreed with the lower court and held that caffeine was an added ingredient, but did not pass or attempt to pass upon the question whether it was a poisonous or deleterious ingredient, which rendered the article injurious to health, but held that as there was a decided conflict of competent testimony on the latter question, it was a question of fact for the jury (241 U. S., 285). The Court did not decide whether there was present in Coca-Cola derivatives of coca and cola, but said there was conflicting evidence on that point (285).

In passing upon the question of what is a distinctive name under the Food and Drugs Act, it was held that coca and cola were not distinctive within the meaning of that Act. The Court did not pass or attempt to pass upon the question of whether Coca-Cola was or was not a valid trade mark and did not decide that the

name Coca-Cola could not be registered as a trade mark under the ten year clause of the Federal Trade Mark Act. Certainly the Food and Drugs Act did not attempt to repeal and cannot be construed as repealing the Federal Trade Mark Registration Act of February 20, 1905, or the prior registration acts.

After the decision of the Supreme Court in *United States v. Coca-Cola Co.*, 241 U. S., 265, the litigation was settled by agreement of parties and a decree entered, which expressly provides that it shall not be applicable or adversely employed in any other litigation in which the Coca-Cola Co. is interested. A certified copy of this decree is annexed to the petition of the Coca-Cola Company filed by leave of this court on May 7, 1918. That this was proper for the protection of the plaintiff's trade mark rights in Coca-Cola is clear from the decisions in *United States v. American Tobacco Co.*, 164 Fed., 700; 221 U. S., 106, 153; 191 Fed., 371, 418, 420, 423, 425, etc., where trade marks and brands acquired for the purpose of or during an unlawful monopoly were recognized and protected as property.

The contention that Coca-Cola is adulterated (Br., p. 290) needs no consideration. It is simply a variation of the asserted unclean hands. Advertisements discontinued many years before the filing of this bill are cited. This assertion is predicated on the same false premise, viz., that there is no cola in Coca-Cola. Then it is asserted that since all the

cocaine is taken out of the coca leaves which are used in Coca-Cola, that a valuable ingredient is abstracted and hence, the conclusion is drawn that Coca-Cola is adulterated under Section 7 of the Food and Drugs Act. This, like much that precedes it, is based on counsel's unwillingness or inability to perceive that the name Coca-Cola is a trade mark for a soda fountain drink, not the description of a medicine. The name Coca-Cola means nothing except the particular product sold by the plaintiff. By constant use and association, it means *that thing*. It identifies a specific article of wide sale and popularity.

It is familiar doctrine that where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or remedy can be only that which the statute prescribes. There is neither a statute nor any principle of common law which would make misbranding or adulteration or even a clear, conclusive and final adjudication between the United States and the Coca-Cola Co. of technical misbranding an obstacle to the protection of established trade and property rights in the word Coca-Cola.

Ford Motor Co. v. Boone, 244 Fed., 335;

Burnhisel v. Firman, 22 Wall., 170;

Barnet v. National Bank, 98 U. S., 555, 559;

Oates v. National Bank, 100 U. S., 239, 250;

Stephens v. Monongahela Bank, 111 U. S., 197;

Walker & Co. v. Globe Newspaper Co., 130 Fed., 594; 140 Fed., 305; 210 U. S. 356, 362;
Galveston Ry. Co. v. Wallace, 223 U. S., 481, 490;
Wilder Mfg. Co. v. Corn Products Co., 236 U. S., 165;
Coca-Cola Co. v. Bennett, 238 Fed., 513, 518;
Mich. Central R. R. Co. v. Vreeland, 227 U. S., 59, 67;
St. Louis, Iron Mountain & So. Ry. Co. v. Craft, 237 U. S., 648, 655.

The adjudication, if there was any, in *United States v. Coca-Cola Co.*, 241 U. S., 265, is entirely collateral and inapplicable to the present proceedings.

Northwestern Milling Co. v. Callam & Sons, 177 Fed., 786, 788;
Independent Baking Powder Co. v. Boorman, 130 Fed., 726, 728;
Weyman-Bruton Co. v. Old Indian Snuff Mills, 197 Fed., 1015;
LaFayette Bridge Co. v. City of Streator, 105 Fed., 729, 731;
General Elec. Co. v. Wise, 119 Fed., 922, 924;
National Distilling Co. v. Cream City Importing Co., 86 Wis., 352; 56 N. W., 864;
Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720, 724;
Coca-Cola Co. v. Bennett, 238 Fed., 513.

As to the inapplicability of the doctrine of unclean hands see:

Siegert v. Gandolfi, 149 Fed., 100, 103;
Dr. Peter Fahrney & Sons Co. v. Ruminer, 153
 Fed., 735, 737;
Wells & Richardson Co. v. Abraham, 146 Fed.,
 190, 197;
Rectanus Co. v. United Drug Co., 226 Fed.,
 545, 548.

THE ALLEGED VIOLATION OF THE TRUST LAWS IS NOT
 ESTABLISHED AND IS IRRELEVANT.

The charge in the amended answer, and urged in the argument, concerning what counsel call, with much elocution, "plaintiff's vicious unfair competition" against the Koke Companies and the alleged oppression of dealers in Koke, is probably not intended to be taken seriously. The contracts referred to at the argument where it was charged that plaintiff constrained dealers to agree not to handle any product which would be used as a substitute for Coca-Cola, are all predicated on the fact, proved in each case and confessed in the contract itself by the dealer, that he had been guilty of passing off a substitute as and for Coca-Cola.

In addition to Van Winkle, the Secretary of the

Koke Company of Texas,¹ a considerable number of other witnesses were called and examined on this subject. They were also cross-examined and many were forced to admit that Koke is a well recognized abbreviation of the name Coca-Cola. For example, Culbreath (Rec., 1703-4) states it as a matter of common knowledge that in Texas, Koke is a common nickname for Coca-Cola. Substitution of Koke for Coca-Cola and suggestions of passing off by defendants' salesmen and "the public will not know the difference," also were admitted.

It is evident that the Coca-Cola Company's efforts to stop the dishonest assaults on its business by the practices of fraudulent traders is not only legitimate but praiseworthy. It is denied, however, that its actions, in this respect, are a defense to this suit.

These, like the defense attempted to be predicated on the alleged violation of the Harrison anti-narcotic law, the Food and Drugs Act, the Sherman and Clayton Acts, are not sustained by the evidence but, if established, are irrelevant under all the authorities. (*Ford Motor Co. v. Boone*, 244 Fed., 335.)

The alleged violation of the Anti-Trust Acts was raised against The Coca-Cola Company and held,

¹ Attention is invited to Defendant's Exhibit 214 produced by this witness, where John Schaap & Sons wrote the defendant Koke Company of Texas about a visit of a Coca-Cola salesman to a dealer who evidently had been passing off Koke on calls for Coca-Cola. This dealer stated that he was going to resume handling Koke. "I told him," says the correspondent, "that he must not sell it as Coca-Cola but as Koke. He was confident that he could do this."

even if established, not to be a defense in *Coca-Cola Co. v. Bennett*, 238 Fed., 513, in *Coca-Cola Co. v. Butler*, 229 Fed., 224, and *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720, 724, following the rule laid down by Judge Morrow in *Insurance Co. v. Clunie*, 88 Fed., 160, 170.

To the same effect are:

Wilder v. Corn Products Co., 236 U. S., 165;
Insurance Oil Tank Co. v. Scott, 33 La. Ann.,
 946;
Milling Co. v. Callam, 177 Fed., 786;
Baking Powder Co. v. Boorman, 130 Fed., 726;
*Weyman-Bruton Co. v. Old Indian Snuff
 Mills*, 197 Fed., 1015;
Brown Saddle Co. v. Troxel, 98 Fed., 620;
Bonnie v. Bonnie, 169 S. W., 871.

PLAINTIFF'S REGISTRATION IS VALID AND DEFENDANTS INFRINGE.

It was contended at the oral argument and is suggested in defendants' brief that the Coca-Cola Company's registration of the trade mark Coca-Cola, under the ten-year proviso of the Act of February 20, 1905, is invalid because of the alleged use of certain other marks for similar products during the ten-year period. The marks, alleged to have been used, either infringe plaintiff's trade mark or they do not. If they do not, the contention is irrelevant. There is no pretense that anyone but the Coca-Cola Company has used the

name Coca-Cola during the ten-year period and plaintiff's registered trade mark consists of the name Coca-Cola. If the names alleged to have been used infringe Coca-Cola, this case is governed by *Thaddeus Davids Co. v. Davids*, 233 U. S., 461. Here Mr. Justice Hughes observed:

"We need not stop to discuss the contention that the complainant's use had not been exclusive or that the mark had not been used in interstate commerce, or the further defense that the complainant should be denied relief because it had deceived the public. It is enough to say that these contentions were without adequate support in the evidence and were properly overruled by the Circuit Court."

The decree of the Circuit Court of Appeals was reversed and that of the Circuit Court affirmed.

The facts, on which the contention was based that the plaintiff had not the exclusive use of the mark during the period, are to be found in a note to Judge Hough's opinion (190 Fed., 285), printed in 1 T. M. Rep., 215-219:

"Three defenses are urged that will merely be noted:

"1st. It is said that complainant has long so misled the public in respect of its products that its trade mark is not deserving of protection within such cases as *Worden v. California Fig Syrup Co.*, 187 U. S., 282. The trade mark is the single word 'Davids.' How that single word can convey or be used to convey any false impression to the public is difficult to see; but entirely apart from this, I

am of opinion that the complaints made by the defendants are without merit if they are not frivolous, viz., that 'Electro-chemical Writing Fluid' is not prepared by any electrical process; that 'Oriental Carmine Ink' does not come from the Orient, and is not based on extract of cochineal, and that 'Silk Filtered Ink' is no longer silk filtered, although it once was.

"2nd. The registration of complainant's trade mark is said to be invalid because complainant and its predecessors had not had exclusive use thereof for the statutory period. The only evidence to support this contention is that an impostor named Davis sold 'Davis' Inks' to people who thought they were buying Davids' ink. The exclusive use of a trade mark means rightfully exclusive use, and is not disturbed by an unsuccessful effort to steal the same, nor even by furtive and partial success in making some profit out of the attempted theft."

It is then reasserted (Brief, 291) that the name Coca-Cola is not a trade mark. Counsel in this respect disregard two acts of Congress under which Coca-Cola is registered as a trade mark, the registrations not attacked and sustained in this very proceeding in the Patent Office, and three decisions of Circuit Courts of Appeal (*Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720; *Coca-Cola Co. v. Nashville Syrup Co.*, 215 Fed., 527; *Coca-Cola Co. v. Bennett*, 238 Fed., 513), and the decisions of any number of district courts which have sustained the name Coca-Cola as a trade mark. The name Coca-Cola was, when it was first adopted, an entirely new compound word, but under the Act of

Congress of February 20, 1905, under which it is registered, it is of no consequence if it were descriptive, since under that Act descriptive words exclusively used for ten years prior to its passage, when registered are entitled to the same protection as other trade marks. (*Dauids v. Dauids*, 233 U. S., 461, 466; *Rossman v. Garnier*, 211 Fed., 403; *Manitou Co. v. Schueler*, 239 Fed., 593, 602; *Stark v. Stark*, 248 Fed., 154, 156).

The next twenty pages of defendants' brief are consumed in the purely academic discussion whether or no the words Koke and Dope infringe plaintiff's trade mark Coca-Cola. It is perfectly plain that Koke is a natural and inevitable abbreviation of the longer name, but this record shows as a fact that the words Koke and Dope are common nicknames used by the public for Coca-Cola, that they are fraudulently used by defendants with the intention of passing off defendants' spurious product as and for Coca-Cola and that the use of these nicknames by defendants actually results in passing off and deception. It makes no difference whether the variety of fraud which this record discloses is the kind technically known as trade mark infringement or some other kind. Whatever the variety, it is fraud and all that plaintiff asks is to be protected against fraud.

To assert that Koke is not a mere abbreviation of Coca-Cola is flying in the face of the obvious. It is the first three letters of the word Coca-Cola—C-o-c. This, of course, is pronounced Coke. Defendants' mark

is spelled K-o-k-e, but its pronunciation is precisely the same as the familiar contraction of plaintiff's trade mark. That Koke is merely a contraction of the word Coca-Cola is a necessary and obvious conclusion, even without evidence to this effect; but the testimony in this case shows as a matter of fact that Koke is used by the public as an abbreviation of Coca-Cola and is so found as a fact by the court below. So, there is no necessity of basing the conclusion in this respect, even on an obvious fact. As far as the word Koke is concerned, defendants have plainly appropriated an essential part of plaintiff's trade mark, which has resulted in deception.

Saxlehner v. Eisner & Mendelson Co., 179 U. S., 19, 33. Mr. Justice Brown said:

"It is not necessary to constitute an infringement that every word of a trade mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article. It was said by Vice Chancellor Shadwell, in 1857, that if a thing contained twenty-five parts, and one only was taken, such imitation would be sufficient to contribute to a deception, and the law would hold those responsible who had contributed to the fraud. *Guinness v. Ullmer*, 10 Law Times, 127. While this may be a somewhat exaggerated statement, the reports are full of cases where bills have been sustained for the infringement of one of several words of a trade mark. *Shrimpton v. Laight*, 18 Beav., 164; *Clement v. Maddick*, 1 Giff., 98; *Hostetter v. Vonwinkle*, 1 Dill., 329; *Morse v. Worrell*, 9 Am. Law Review, 368; *Grillon v. Guenin*, Weekly Notes (1877), 14;

American Grocer Pub. Association v. Grocer Pub. Co., 25 Hun., 398."

The word Dope is not so obviously an abbreviation of Coca-Cola as is the word Koke but the evidence in this case shows and the court below found as a fact that it is as unmistakably a short name or nickname for Coca-Cola as is Koke.

It is then asserted that the words Koke and Dope are purely descriptive, Koke meaning cocaine or any narcotic drug, and Dope, because synonymous with Koke, having the same descriptive force. Defendants' good faith in assuming this position is questionable when it is recalled that both the words Koke and Dope are claimed by defendants as trade marks for their product and proper registration of them in the Patent Office is asserted, not under the ten-year clause of the present statute, but as technical trade marks and hence as arbitrary words. But it is evident that, as applied to Coca-Cola, both of these terms are fanciful and non-descriptive and are as fortuitous as nicknames applied to people.

It does not matter in the present case whether the terms Koke and Dope are descriptive in a general sense, or at the prescription counter, or race track, for the evidence overwhelmingly shows that at soda fountains, or places where soft drinks are sold, these two terms have been and are systematically and generally applied by the public to designate Coca-Cola, and

nothing else and that defendants adopted these names with knowledge of this fact.

A reference to Schedule II to plaintiff's brief is a demonstration that the words Koke and Dope are short names used by the public in ordering and identifying Coca-Cola. 'This is shown not only by the testimony adduced by the plaintiff (Schedule II, p. 24) but by the admissions of defendants' witnesses. (Schedule II, p. 53). It is found as a fact by Judges Sawtelle and Foster and with respect to Koke, by the Examiner of Interferences in the Patent Office and by the Commissioner of Patents. The contention that the words Koke and Dope are terms of description applicable not alone to Coca-Cola but also to its imitations, is a complete reversal of the trade position assumed by defendants where the claim is made that these words are defendants' exclusive trade marks and is an uncandid afterthought induced by the exigencies of this case.

In view of the fact that there are two subsisting registrations of the word Coca-Cola, which are not attacked, and that it has been repeatedly sustained as a valid trade mark, the quotations from *Delaware & Hudson Canal Co. v. Clark*, 80 U. S., 311, 328, and *Trinidad Asphalt Co. v. Standard Paint Co.*, 163 Fed., 977; 220 U. S., 446 (Br. 324, 325) are without application or force.

The appalling array of quotations from American and English authorities (Defendants' Brief, 326, 391)

where courts have refused to protect descriptive, generic or personal names, may be discriminated and laid aside without detailed criticism or review. In each case there was an utter failure to prove any registration which would give technical trade mark rights as in the present case, and also a complete failure to prove a generally acquired secondary or designative meaning of the term, and in every case an absolute failure to prove any fraud on the part of defendant in adoption and use. Here the record demonstrates (1) Registration of Coca-Cola as a technical trade mark; (2) Secondary meaning in the retail trade and by purchasers for consumption, of the terms Koke and Dope, both being abbreviated, slang terms for Coca-Cola, and the understanding both by the retail seller and the purchaser for consumption that each term designates plaintiff's product. It must also be recalled that Coca-Cola is the only advertised soft drink of its kind and that in all places where it is sold Coca-Cola signs are displayed, so that the purchaser has them plainly in view. He asks for Koke or Dope with the Coca-Cola sign staring him in the face, and takes Coca-Cola without objection. That he has Coca-Cola in mind, is shown not only by the surrounding circumstances and the purchaser's acquiescence in receiving Coca-Cola when Koke or Dope is asked for, but also by the undisputed evidence of plaintiff's investigation of soda fountains (Schedule II, p. 84). (4) But this case has a peculiar element not found in any other case either

of technical trade mark or secondary meaning. It was the purchasing public and consumers that applied the terms Koke and Dope to plaintiff's product. This is not a case, so far as these two terms are concerned, of adoption, use and extensive advertising of either term by the Coca-Cola Company. The public itself selected the terms and applied them as designating Coca-Cola. This is a demonstration both of their trade mark and secondary meaning use, for the two are not incompatible. (5) This case presents a demonstrated fraud on the part of defendants in their selection and use of the terms Koke and Dope. Plaintiff's product was designated by these two terms long before defendant or any of its pretended predecessors selected the terms as a means of passing off another product which, in localities where Coca-Cola is called Koke is sold by defendants under the name Koke and the same product, in places where Coca-Cola is called Dope, is sold by defendants under that name. This fraud is shown by the testimony of the Mayfields, of Murphey, of Wright and Moore, of the various retail dispensers of defendants' product, by the imitation by defendants of plaintiff's bottles, labels, barrels and the color, taste and general appearance of its product, the imitation of the color and script form in writing Koke and Dope, and also most emphatically by the use of both terms Koke and Dope as names for one and the same product put out by defendants. Therefore, whether the terms be treated as arbitrary and fanciful, or as descrip-

tive with an acquired secondary meaning, the result is the same. Defendants, at the instigation of Mayfield, have deliberately and intentionally adopted, as names of their merchandise the two terms, which they knew are indicative of Coca-Cola, and under which they knew the purchasing public asks for and identifies Coca-Cola. So that we have in this case an actual fraudulent purpose in the adoption of the names complained of and actual fraudulent representation of defendants' officers and salesmen, suggesting to dealers that defendants' product be sold at added profit as and for Coca-Cola, and that it has in fact been sold as and for Coca-Cola. That is to say, in this case there is no need of indulging in any inferences as to what defendants intended, or in any speculation concerning the deceptive results of defendants' acts. Both are conclusively proved, and indeed are admitted. The purpose was fraud and the result deception. This in itself distinguishes the present controversy from the cases cited by defendants in their brief.

It is not necessary, in order that a term may have either a technical trade mark or secondary meaning significance, that the public use it with the name of the manufacturer of the desired article distinctly in mind. It is enough that it be employed for the purpose of identifying a well-known and approved product, which the would-be purchaser has in mind

as a result of extensive advertising, approved quality, or previous use.

Powell v. The Birmingham Vinegar Brewery Co., 14 R. P. C., 720, is applicable in this case upon two questions. Here it was said by Lord Herschell in delivering his opinion in the House of Lords (p. 730):

“I think that the fallacy of the appellants’ argument rests on this; that it is assumed that one trader cannot be passing off his goods as the manufacturer of another unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all. In the present case, it seems to me that ‘Yorkshire Relish’ means the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it means a particular manufacture; and that when a person sold ‘Yorkshire Relish,’ as the appellants did, by selling it as ‘Yorkshire Relish,’ and calling it ‘Yorkshire Relish,’ they represented to the public that it was that manufacture which was known as and by the name of ‘Yorkshire Relish.’”

And again by Lord Davey (p. 731):

“The appellants’ contention is, if I understand it rightly, that the respondent has no monopoly of the manufacture, and that all the world may manufacture these goods if they can, and if they can succeed in manufacturing these goods, they are entitled

to call them by the only name by which these goods can be described. Now, my Lords, I do not find it necessary to say much or anything as to the legal validity of the appellants' argument as I have described it; but it fails in fact. The appellants do not pretend that they have discovered the respondent's secret, or that the goods are made according to the same recipe. All they say is that they are substantially identical with the respondent's, or a 'wonderful match.' Other words are used indicating a close similarity between the two sauces; but it is not pretended that the appellants' sauce is made of the same compounds or made in the same way, although it is said that it produces much the same result. The appellants, therefore, are misrepresenting the character of their goods when they call them 'Yorkshire Relish.' They are not, in fact, 'Yorkshire Relish,' though I will assume they closely resemble that compound."

The doctrine of *Powell v. The Birmingham Vinegar Brewery Co.*, 14 R. P. C., 720, has been recently affirmed and applied in *Publishing Co. et al. v. Merriam Co.*, 238 Fed., 1, where it was said by Judge Denison:

"It is not of controlling importance to the true application of the secondary meaning theory that the public should appreciate the personal identity of the manufacturer. The deception involved in every such case, as in a trade mark case, is said to be a deception as to the origin of the goods; but this is a formula for expressing the ultimate result. With reference to articles which have trade names, it is the article itself and its good qualities which the public appreciate and which cause it to desire to get the genuine article made by the manufac-

turer who has established its reputation, rather than something made by some one else. Particularly under present day conditions, the purchasing public may have a fixed purpose to buy a given article and not a substitute therefor, and yet be quite ignorant whether the genuine article is made by one or another manufacturer. Even under earlier conditions, the purchaser of 'Stone Ale' or 'Camels' Hair Belting' or 'Glenfield Starch' very likely knew as little as he cared about the personal identity of the maker."

As already shown, however, these two terms Koke and Dope are not descriptive or generic terms, but, as applied to Coca-Cola, are purely arbitrary, and are the choice of the public and consumers as indicating Coca-Cola by abbreviated substitute terms. It cannot be important why the public may have given these nicknames to Coca-Cola. The fact is that the public has done so and defendants are knowingly and unfairly taking advantage of this fact.

After having elaborated the argument against the acquisition of secondary meaning during the period of sole manufacture, counsel proceeds to upset the asserted fact on which this argument is based by enumerating a number of terms alleged to be applied to various products imitating Coca-Cola (Defendants' Brief, p. 423), and add that there are hundreds of others. This is utterly inconsistent with the asserted fact upon which the argument of non-acquisition of secondary meaning because of alleged sole manufacture is based.

Kellogg Toasted Corn Flakes Co. v. Quaker Oats Co., 235 Fed., 657, is paraded with great gusto, probably because some of the present counsel for the Coca-Cola Company were counsel for the defendant, Quaker Oats Company, in that case. In that litigation plaintiff sought to establish a secondary meaning for the term "toasted corn flakes." It was shown (1) that this phrase was absolutely and completely descriptive of both plaintiff's and defendant's products, and that both were made of corn, flaked and toasted; (2) that plaintiff utterly failed to show any secondary meaning designative of its product by the phrase "toasted corn flakes," but on the contrary plaintiff's own evidence showed conclusively that the term "toasted corn flakes" was used in a descriptive sense purely to indicate only the *kind* of product, while the different manufacturers of the article were shown by added identifying names or in other ways, the difference in packages, plaintiff's product being known as "Kellogg's Toasted Corn Flakes" and defendant's as "Quaker Toasted Corn Flakes"; (3) that there was no fraud even charged against the defendant and the finding of both of the courts exonerated defendant from any suspicion of fraud, deceit or deception; (4) and that defendant had so plainly and unmistakably differentiated its package and markings from the package and markings of plaintiff, that all of plaintiff's witnesses declared they could and did readily differentiate between the two not only by the words "Kel-

logg's" and "Quaker," but by the differences in the packages which could be seen even across a retail store.

As to the arguments on the "get-up" of goods and "get-up" of packages (Defendant's Brief, pp. 432, 465) and the cases there cited, it is plain that the arguments and the decisions are good enough law when they have any application, but they are irrelevant in the present instance. The product Coca-Cola has been protected in many courts not only in name, nicknames, labels, crowns and barrels, but in the color of the product itself.

Coca-Cola Co. v. Gay-Ola Co., 200 Fed., 720;
Coca-Cola Co. v. Nashville Syrup Co., 200
 Fed., 157; 215 Fed., 527;

*Coca-Cola Co. v. American Druggists Syndi-
 cate*, 200 Fed., 107;

Coca-Cola Co. v. Koke Co., 235 Fed., 408;

Coca-Cola Co. v. Butler, 229 Fed., 224;

Coca-Cola Co. v. Bennett, 238 Fed., 513.

However, all the cases cited on this point by counsel, including *U. S. Tobacco Co. v. McGreenery*, 144 Fed., 531; 144 Fed., 1022, which went to defendant because the resemblances between packages were common to the trade, are not pertinent because, even if it were conceded that the color, taste, appearance of Coca-Cola and the bottles in which it is put up and sold are common to the trade, it is admitted that the

form, color and appearance of label, and the color and type of the lettering thereon are peculiar to Coca-Cola and distinctive and designative of it, and the evidence shows and the court below found that defendants deliberately and purposely closely imitated every element of this kind, including the color and script with the flourish of Coca-Cola, the form, size and color of the label and the facsimile signature thereon. It is not true, as counsel keep asserting, that the use of the duplicated labels was discontinued. Specimens were taken from a wagon and purchased in the market long after the institution of this suit and showed that the imitative labels and crowns were in actual use at that time. (Rec., 849; Exhibits 154, 160.)

The references to the cases of *Coca-Cola Co. v. Branham*, 216 Fed., 264, and *Coca-Cola Co. v. Glee-Nol Bottling Co.*, 221 Fed., 61, are without force.

In *Coca-Cola Co. v. Branham*, the suit was against the bottler of syrup, which he sold as Koke. The record was entirely different from the present one and as, found by the Court, no fraud was shown. There was no suggestion of substitution or actual substitution as in the present case. The Court expressly found:

“There is no proof that defendants sold ‘Koke’ for ‘Coca-Cola’ or advised their customers to do so.”

The Court therefore differentiated the case from *Coca-Cola Co. v. Gay-Ola Co.*, 200 Fed., 720.

It was also said:

"If the use of the name (Koke) had been observed by defendants, and it was afterwards adopted by them with the purpose and intention of taking advantage of that fact, and to engage in the manufacture and sale of a beverage and call it 'Koke' and sell it 'as and for "Coca-Cola",' then a case of unfair competition would undoubtedly be made out."

These are exactly the facts shown by the present record and it is evident that if the Court had had the record in this case before it in the Branham case, the ruling would certainly have been in favor of plaintiff.

The dictum that the misuse of nicknames is not enjoinable is directly overruled by the later decision of the Circuit Court of Appeals of the Eighth Circuit, in which the Branham case was decided, in *Denver Chemical Mfg. Co. v. Lilley*, 216 Fed., 870, where Judge Carland said:

"There are no disputed questions of law. It being conceded, as it must be, that while appellant adopted the name 'Antiphlogistine' for its product, still if for some reason the general public has given to the product another and different name, by which it alone is known to the trade, the appellant becomes entitled to protection by injunction against one who thereafter endeavors through the adoption of such term as the public employs as synonymous for or as a secondary designation of such

product, for in so doing the purchasing public may be deceived as to the article purchased, and the appellant is deprived of that trade which its industry and money have built up. The question to be decided is entirely one of fact. The questions of fact are: Had the name 'Denver Mud,' prior to the use thereof by the Germicide Company, come to indicate and designate in the public mind the appellant's medicament alone? Is the Germicide Company, by the use of the label above described, endeavoring to pass off to the public its plastic compound as that of the appellant?

"The intention of the Germicide Company must be found from what it does."

In *Coca-Cola Co. v. Glee-Nol Bottling Co.* (*supra*), it was found that the name of the defendant's drink was not at all like that of the plaintiff, that the one drink was not like the other either in taste or color, that there was no evidence at all having a tendency to prove that the defendant in any way undertook to mislead the dealers or induce them to substitute Glee-Nol for Coca-Cola when the latter was called for and no evidence from which it could be inferred that anything defendant did amounted to an imitation of any distinguishing feature of the plaintiff's product, or was intended to, or in fact did beguile the public or any part of it, into buying Glee-Nol under the impression that they were buying Coca-Cola and therefore a case of unfair competition was not made out, the Court concluding by saying:

"The essence of the wrong in unfair competition consists in the sale of the goods of one manufac-

turer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant the action fails. *Howe Scale Co. v. Wyckoff*, 198 U. S., 14; *Coca-Cola Co. v. Branham*, 216 Fed., 264."

These two cases are therefore unlike the present one in the facts, for here Koke and Dope are shown to mean Coca-Cola, and imitation of bottles, barrels, labels, colors and names, an actual fraudulent purpose on the part of defendants, deliberate intention of passing off by the adoption of names, the suggestion of passing off and actual fraudulent passing off are proved.

CONCLUSION.

Without being overnice in the choice of words, defendants' scheme as demonstrated by this record is a cheap and common swindle, attempted to be justified at the outset by the fabrication of testimony, to establish a fictitious claim of prior use.

The scheme of fraud devised and carried out by these defendants must be effective and profitable or it would not be so persistently litigated. That it is a deliberately dishonest enterprise cannot be doubted. Defendants' intentional fraud, and the repeated suggestions of passing off are not only demonstrated by the testimony, but are not even denied. The salesmen who counseled dealers to pass off defendants' imitation for Coca-Cola and "no one could tell the difference" though in defendants' employ were not called

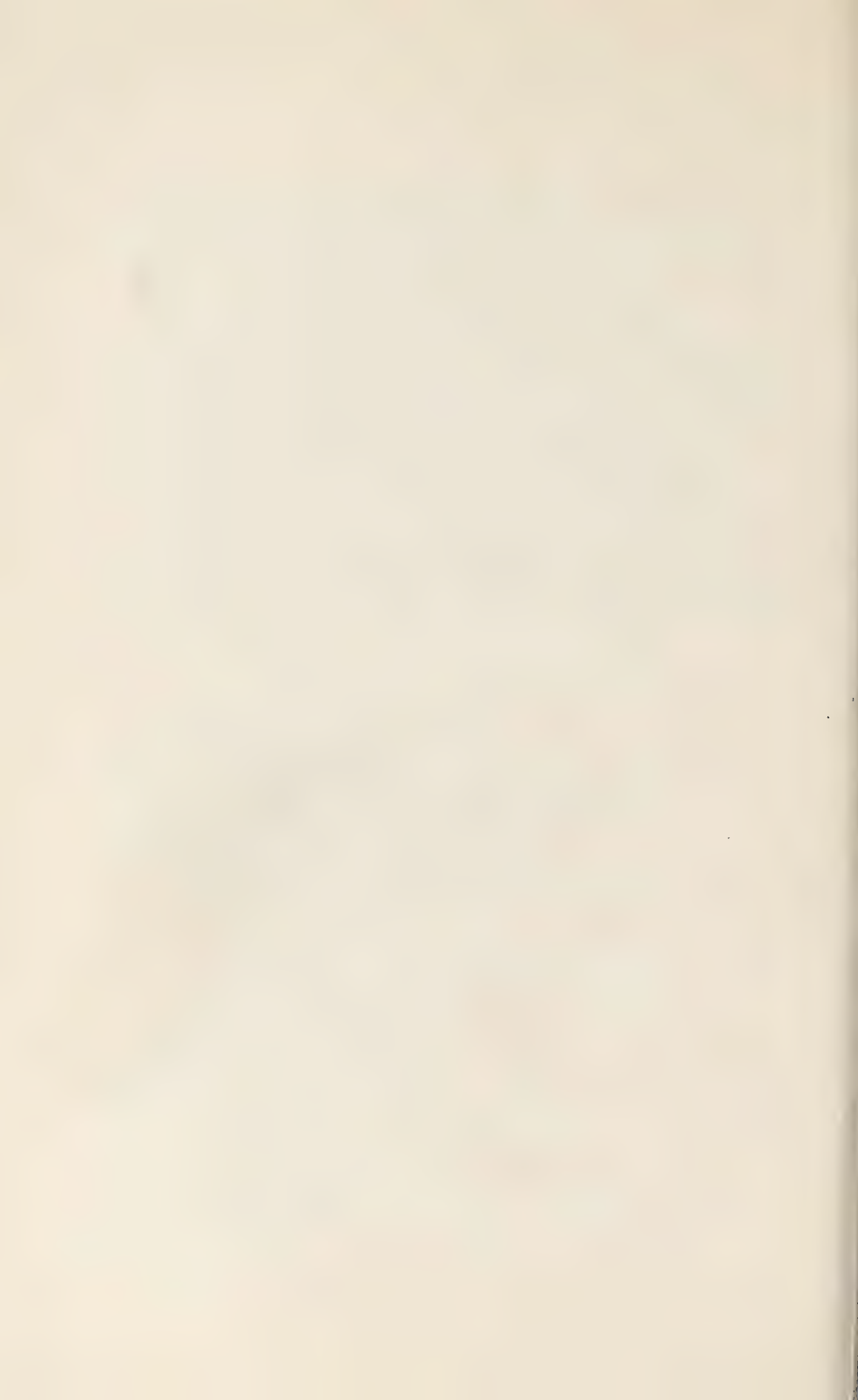
as witnesses. Fraud, deceit and deception are admitted. Two courts on the record now before this Court have found sweepingly for the plaintiff, and two tribunals of the Patent Office have independently come to the same conclusion. J. C. Mayfield, an officer of all the defendants here, their alleged predecessor in trade and the prime mover in the schemes, has been branded a fraudulent trader and by two courts and the Patent Office as unworthy of belief under oath.

It is urged that this Court put an effectual stop to the scheme of superlatively unfair trading which this record discloses by affirming the decree appealed from.

Respectfully submitted.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

THE KOKE COMPANY OF AMERICA, THE
SOUTHERN KOKE COMPANY, LIMITED,
THE KOKE COMPANY OF TEXAS, THE
KOKE COMPANY OF OKLAHOMA, and
THE KOKE COMPANY OF ARKANSAS,
Appellants,

vs.

THE COCA-COLA COMPANY, a Corporation,
Appellee.

CERTIFIED COPIES OF CERTAIN
OPINIONS AND DECREES.

Upon Appeal from the United States District Court for the District
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FILED
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*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3012.

KOKE COMPANY OF AMERICA, SOUTHERN
KOKE COMPANY, LTD., KOKE COM-
PANY OF TEXAS, KOKE COMPANY OF
ARKANSAS, and KOKE COMPANY OF
OKLAHOMA,

Appellants,

vs.

THE COCA-COLA COMPANY,

Appellee.

**Petition of Appellee for Leave to File Certified
Copy of Decision of Examiner of Interferences,
etc.**

Now comes The Coca-Cola Company, appellee
herein, and respectfully shows to the Court as
follows:

That on the 26th day of December, 1913, The Coca-Cola Company, appellee herein, filed a notice of opposition in the Patent Office at Washington under Section 6 of the Act of February 20, 1905, entitled "An Act to authorize the registration of trademarks used in commerce with foreign nations, or among the several States of the United States, or with Indian tribes, or to protect the same," to the application of the Koke Company of America to register the word "Koke" under the said Act; that The Coca-Cola Company, opposer therein, is the same corporation as The Coca-Cola Company, ap-

pellee herein; that applicant therein is the same corporation as the Koke Company of America, one of the appellants herein and alleged licenser of the remaining appellants herein for the rights claimed by them in the said word "Koke," and the said word "Koke" is the same mark involved herein and the goods upon which it was claimed to be used were the same goods as those involved in this proceeding; that the alleged date of first use of the name "Koke" in the application of the Koke Company of America to the Patent Office was the year 1888; that the basis of the said opposition to said application for registration by said Koke Company of America by said Coca-Cola Company, appellee, in said proceeding was that the registration and use of said word "Koke" would cause damage to the opposer, Coca-Cola Company, because it was an abbreviation of opposer's mark "Coca-Cola" and a recognized nickname of its product and enabled the sale of applicant's product as and for Coca-Cola, the product of appellee. After certain interlocutory proceedings, an answer was filed in said opposition which raised substantially the same issues as those raised by the answer herein as to the word "Koke." Testimony was taken under stipulation and order whereby the testimony was to be taken but once and filed in this cause and in the proceeding in the Patent Office, and, accordingly, all of the testimony of The Coca-Cola Company filed in this cause was filed in the Patent Office, and all of the testimony taken on behalf of the Koke Company of America was filed by The Coca-Cola Company in the proceeding in the Patent Office. The Koke Com-

pany of America, however, printed such portions of the testimony as had to do with the word "Koke" and its alleged rights therein. A copy of the record presented on behalf of the Koke Company of America is herewith submitted and if desired will be filed in connection with this petition.

On May 24, 1916, the Examiner of Interferences decided the controversy, holding that the attempted registration of the word "Koke" by the Koke Company of America was an effort to appropriate a nickname for "Coca-Cola," was a fraud and refused the application for registration of the Koke Company of America. A certified copy of said decision is annexed hereto and a printed copy thereof is Appendix IV to the brief on behalf of The Coca-Cola Company, appellee herein, at page 159 thereof. An appeal was taken by the Koke Company of America to the Commissioner of Patents, who, on August 14, 1917, affirmed the decision of the Examiner of Interferences therein. A certified copy of said decision is annexed hereto and a printed copy thereof is Appendix V to the brief on behalf of The Coca-Cola Company, appellee herein, at page 180 thereof. Thereupon, the Koke Company of America filed a petition for appeal and assignment of errors in the Court of Appeals of the District of Columbia which is the appellate tribunal for said proceeding. Said proceeding was accordingly docketed in the said court of Appeals as No. 1151, Patent Appeal Docket, October Term, 1917. On January 5, 1918, in pursuance of the 19th Rule of the said Court the said appeal was dismissed by order of the Court of Appeals of the

District of Columbia, which order is final and still remains in full force and effect. A certified copy thereof is annexed hereto.

At about the same time of the institution of this cause in the United States District Court, for the District of Arizona, The Coca-Cola Company filed its bill of complaint in the United States District Court for the Eastern District of Louisiana, Northern Division, against Southern Koke Company, Ltd., James L. Wright and James C. Mayfield, its officers, and a bottler, The Crescent City Seltz & Mineral Water Company. Said Mayfield is the same person as the alleged predecessor in title of the Koke Company of America and the Southern Koke Company, Ltd., is a party defendant herein, and the alleged licensee of the Koke Company of America; after certain interlocutory proceedings, issue was joined in said last-named proceeding and the pleadings and issues therein were substantially identical with the pleadings and issues in the said proceeding in the United States District Court of Arizona, from which this appeal is taken, and the cause was submitted and heard upon the same evidence and record as in said District Court of Arizona proceeding and in this proceeding, and on the 24th day of May, 1917, a decree was entered by the Honorable Rufus E. Foster, Judge, in said proceeding in the District Court of Louisiana, a certified copy of which is annexed hereto, and a printed copy thereof is Appendix III to the brief on behalf of the Coca-Cola Company, appellee herein, at page 156.

All of the above-certified copies of orders and de-

crees referred to in this petition are made part and parcel thereof. The said proceeding in the United States District Court for the Eastern District of Louisiana, Northern Division, was set for hearing upon the motion of the defendants therein, was argued and decided on the merits after oral argument and briefs for all parties. Said decree therein remains wholly unmodified and unappealed from and in full force and effect and the time within which an appeal can be taken therefrom has elapsed. There was no understanding that said decree was or is to remain interlocutory or that the same is to be modified later so as to conform to the decree which this Court finally directs to be entered.

The proceeding entitled United States vs. Forty Barrels and Twenty Kegs of Coca-Cola, was terminated on the 12th day of November, 1917, by the entry of a decree in the District Court of the United States, Eastern District, Southern Division of Tennessee, a copy of which is annexed.

In the case of Coca-Cola vs. Benjamin Duberstein et al., pending in the United States District Court, for the Southern District of Ohio, Western Division, on the 19th day of March, 1918, an opinion was handed down by the Honorable Howard C. Hollister, Judge of said Court, and on Monday, the 1st day of April, 1918, a final decree was entered therein. Certified copies thereof are hereto annexed.

Petitioner, The Coca-Cola Company, appellee herein, prays for leave to file in this proceeding and make part of the record the documents, decrees and orders herein referred to, that due effect may be

given in this proceeding to each and all of said decrees and orders, and such other relief as may be just and equitable in the premises.

COCA-COLA COMPANY,
By EDWARD S. ROGERS,
Petitioner.

State of Illinois,
County of Cook,—ss.

Edward S. Rogers, being duly sworn, deposes and says that he is one of the solicitors and counsel for The Coca-Cola Company, appellee herein; that he has personal knowledge of the affairs set out in the petition and that the statements in said petition are true.

EDWARD S. ROGERS.

Subscribed and sworn to before me this 27th day of April, A. D. 1918.

[Seal]

LORETTO M. REEVE,
Notary Public.

Certified Copy of Decision of Examiner of Interference in Coca-Cola Co. v. Koke Co., No. 1424.

2—390.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR.
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the Decision

of the Examiner of Interferences dated May 24, 1916,
in the matter of

Opposition

Number 1,424,

The Coca-Cola Company,

vs.

Koke Company,

Trademark for Refreshing Non-Alcoholic Beverage not in the nature of a Food and a Soda Fountain Syrup.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 8th day of September, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second.

[Seal]

R. F. WHITEHEAD,

Acting Commissioner of Patents.

Final Hearing

December 6, 1915.

Paper No. 102.

JHD.

IN THE UNITED STATES PATENT OFFICE.

Opposition No. 1,424.

The Coca-Cola Company,

vs.

Koke Company of America.

Application No. 71,308, filed June 23, 1913, published
December 9, 1913.

Refreshing Non-alcoholic Beverage not in the nature
of a food and a soda-fountain syrup.

Messrs. HAROLD HIRSCH, FRANK F. REED, EDWARD S. ROGERS, F. L. BROWN and FRANCIS M. PHELPS, for The Coca-Cola Company.

Messrs. F. T. F. JOHNSON and JOSEPH W. BAILEY, for the Koke Company of America. AUGUSTINE B. LITTLETON, on brief.

The applicant is seeking to register the word "Koke" as a trademark for "a refreshing non-alcoholic beverage not in the nature of a food and a soda-fountain syrup" (applicant's statement).

The opposition, as originally filed, was based upon the ground, briefly stated, that "Koke" is a

"deceptive imitation in sound, appearance and suggestion of Opposer's said trademark name 'Coca-Cola.' "

The ground of opposition now chiefly relied upon by the opposer (opposer's brief, page 1) is

"that the mark of the applicant is deceptive and should not be registered because Koke is a common abbreviation of opposer's trademark Coca-Cola and a familiar nickname for opposer's product."

The ground of opposition, in the form now relied upon by the opposer, was substituted, for that originally alleged, by an amendment to the notice of opposition, filed more than thirty days after the publication of the mark sought to be registered (Amendment filed August 3, 1914, and modified during the proceedings before the Commissioner on appeal).

It is urged, in behalf of the applicant (applicant's brief, page 108), that the amended notice of opposi-

tion sets up a new cause of action which was not pleaded in the notice of opposition as originally filed. This point was duly raised by the applicant when the motion to amend the notice of opposition was present by the opposer and was decided in applicant's favor by this tribunal (Decision of August 21, 1914). On appeal, the decision of this tribunal was reversed by the First Assistant Commissioner, and the amendment, in a slightly modified form, was entered as a basis for further proceeding (Decision of September 5, 1914). The decision of the first Assistant Commissioner to the effect that the amended notice of opposition does not set up a new cause of action is controlling in its effect upon this tribunal. Further consideration of the merits of that question as a basis for the decision now to be rendered in this case would, therefore, be unwarranted.

The applicant contends that the amended notice of opposition does not state a valid cause of action (applicant's brief, page 8). It is urged that the only valid grounds for refusing registration are those defined in section 5, of the trademark act of February 20, 1905 (as amended), and that the alleged use by the general public of the word "Koke" as an abbreviation of or nickname for "Coca-Cola" does not correspond with any of the grounds named therein, but, at the most, amounts to nothing more than an allegation of unfair competition. This point was raised by the applicant in support of its motion to dismiss the opposition, filed September 18, 1914. In deciding that motion (decision of October 3, 1914) it

was ruled by this tribunal, without passing upon the merits of the specific question thus presented, that the amendments which had been made to the notice of opposition, were not such as to materially change the nature of the proceeding which, as originally filed, was based upon a satisfactory allegation of similarity between the words "Koke" and "Coca-Cola." The first Assistant Commissioner (decision of January 13, 1915) affirmed the decision denying the motion to dismiss but based his action upon entirely different grounds. He overruled applicant's contention that an opposition should be dismissed unless the grounds set up as a bar to registration are found in section 5 of the trademark act, and held that other grounds of damage may be relied upon as a basis for opposition under the broad provisions in section 6. The question of opposer's right to rely upon the original allegation of similarity between "Koke" and "Coca-Cola" was not mentioned.

That an opposition may be sustained and registration refused on grounds other than those specifically defined in section 5 of the trademark act has recently been decided by the First Assistant Commissioner in his decision in *Opposition No. 1,641, Western Clock Co. vs. Sears Roebuck and Co.* (117 MS. D. 465). In that case the opposer alleged that it had manufactured and sold clocks under the trademark "Big Ben," but that it had also advertised such clocks under the trade name "National Call," which had become generally known to the public as an identifying name for opposer's goods. It was held by the acting examiner of interferences that the facts alleged in

the notice of opposition, if established, would not constitute a statutory bar to the registration of the name "National Call" to one who had used it as a trademark, because the ground of opposition relied upon by the opposer did not correspond with any of the reasons for refusing registration defined in section 5 of the trademark act, and that no other grounds for refusing registration should be recognized by the patent office. The decision of the acting examiner of interferences in that case was reversed by the above cited decision of the First Assistant Commissioner, in which it was said:

"This case (*Western Clock Co. v. Sears Roebuck and Co.*, *supra*) seems to be practically on all-fours with that of *The Coca-Cola Co. v. Koke Company of America*, decided by me January 13, 1915."

Both of the above-mentioned decisions of the First Assistant Commissioner are printed in full in Opposer's brief (pp. 215 to 220).

In view of the above-cited decisions of the First Assistant Commissioner, one rendered in this case, and the other in the case of *Western Clock Co. v. Sears, Roebuck & Co.*, a ruling by this tribunal to the effect that the amended notice of opposition does not state a valid ground of opposition, as contended by applicant, would be unwarranted. Applicant's alleged right to registration and opposer's alleged damage must therefore be determined from the evidence which has been introduced in support of the facts pleaded in the notice of opposition and applicant's answer thereto.

That the beverage for which applicant is seeking to register "Koke" as a trademark and the product which the opposer sells under the name "Coca-Cola" are merchandise of the same descriptive properties, as that term is used in trademark law, is not controverted. The decision to be rendered in this case is therefore dependent solely upon the alleged conflicting use of the marks "Coca-Cola" and "Koke" in connection with the manufacture and sale of such goods.

It is satisfactorily established by evidence introduced by both parties to this proceeding that "Coca-Cola" was made and sold in small quantities by one J. S. Pemberton, of Atlanta, Georgia, at least as early as the year 1887. The Coca-Cola Company in its notice of opposition, alleged title through mesne assignments from said Pemberton. The applicant, in its answer, alleged that its predecessors in business, acquired some interest in Coca-Cola from the same J. S. Pemberton, and evidence has been introduced in support of such claim. According to this testimony J. S. Pemberton was doing business in 1887 under the name "Pemberton Chemical Company" and, as a part of that business, was making and selling Coca-Cola. In 1888 he entered into partnership with J. C. Mayfield, E. H. Bloodworth, and A. A. Murphy, after which the business was continued under the name "Pemberton Medicine Company." The applicant claims that the Coca-Cola business was understood to be a part of the consideration advanced by Pemberton when the partnership was formed. This claim, in behalf of the appli-

cant, to the effect that a predecessor of the Koke Company of America acquired some interest in the Coca-Cola business, as a result of a transaction which occurred in 1888, is held to be of no importance in view of testimony relative to subsequent events introduced and relied upon by the applicant. The substance of that testimony is to the effect that a controversy arose between Pemberton and the other members of the Pemberton Medicine Company soon after the partnership was formed at which time Pemberton announced that he had agreed to let his son have the Coca-Cola business (Applicant's Record, pp. 391 and 777), and that, although the other partners did not consent to the surrender of Coca-Cola, they nevertheless agreed to adopt a different name for the product which had previously been sold as such (Applicant's Record, pp. 391 and 778). That was in 1888 and there is no evidence of record that the applicant or any of its alleged predecessors afterwards used or attempted to use the name "Coca-Cola." If applicant's predecessors ever had any interest in the mark "Coca-Cola," as to which no opinion need be expressed, it is held that they abandoned the same by intentionally and deliberately discontinuing its use in 1888 and by failing to resume such use during the following twenty-seven years (J. C. Mayfield, Sr., XQs. 1224, 1225). Moreover, the opposer has introduced testimony and documentary evidence relied upon to perfect a continuous chain of title to and continuous use of "Coca-Cola" from 1887 to the present time. That evidence has been abstracted and tabulated on pages 119 to 135 of

opposer's brief. That it is sufficient for the purpose, if opposer's title to "Coca-Cola" is at all material to this case, appears to be conceded, and will be so regarded, since applicant has not questioned the same in its brief. It is therefore deemed to be unnecessary to make any detailed analysis of the evidence which has been introduced by the opposer to establish its title to "Coca-Cola" or of that which has been introduced in behalf of the applicant for the apparent purpose of impairing the same.

The opposer has not established, by the evidence which has been introduced, and does not appear to have attempted to establish, that any person has ever been misled as a result of any similarity or resemblance between the marks "Coca-Cola" and "Koke," into a purchase of applicant's goods believing them to be the goods of the opposer. In the absence of such proof, and in view of the fact that both parties have been actively engaged in a competitive business for a number of years, it should not be assumed that there is any likelihood of confusion, as originally alleged by the opposer, because of any resemblance which the mark "Koke" bears to the mark "Coca-Cola." It is therefore held that the opposer is dependent upon the allegation of the amended notice to the effect that "Koke" is a common abbreviation and familiar nickname which has been adopted and used by the public as a means of distinguishing opposer's goods from other goods of the same descriptive properties.

The opposer has introduced the testimony of numerous witnesses located in different sections of the

country to the effect that customers at soda-fountains who ask for Koke accept Coca-Cola without objection. In many instances such customers, when asked if they meant Coca-Cola, answered in the affirmative. Some of the witnesses testified that, to their recollection, "Koke" had been used as a nickname for "Coca-Cola" for as much as twenty or twenty-five years. No attempt will be made to make a detailed analysis of the mass of testimony which has been introduced to establish this point of opposer's case. It is objected to by the applicant on the ground that it is the testimony of interested witnesses and to a certain extent that is true. Much of it is the testimony of detectives employed by the opposer and sent to different parts of the country for the express purpose of collecting evidence. Much of it is the testimony of customers of The Coca-Cola Company. Some of it must be entirely disregarded on the ground that it is mere hearsay. Some was properly objected to on the ground that it was given in response to leading questions. A large proportion of this evidence, however, is free from objection, other than that it is the testimony of witnesses who, as customers or employees, are more or less interested in the success of the Coca-Cola Company as a commercial institution. No good reason has been shown why such evidence should not be accepted as true. It has been abstracted and tabulated, for convenient reference, on pages 137 to 171 of opposer's brief. It has not been satisfactorily rebutted and counsel for applicant do not contend that the word "Koke" has not been so used.

The argument relied upon by applicant is that "Koke" is in many instances used by the public in a generic sense as a name for any of fifty or more cola drinks which may be found for sale on the market (Applicant's Brief, pp. 162, 163, 167, 168), and that to such extent as "Koke" is used by the public as a name for "Coca-Cola" such use should not be regarded as having originated because of any similarity between the marks "Koke" and "Coca-Cola," but because of an alleged general impression that "Coca-Cola" contained some sort of powerful, habit-forming drug such as cocaine (Applicant's Brief, pp. 156, 157). It will therefore be regarded as an established fact, for the purpose of deciding this case, that the word "Koke" has been used quite generally for many years in certain sections of the country, and particularly in Texas, as an abbreviation or nickname, intended to distinguish opposer's goods from goods of like descriptive properties.

The arguments which have been advanced in Applicant's Brief (pp. 157, 163, 167, 168, 252), to the effect that "Koke" is a generic term used by the public as a nickname for any one of a class of fifty or more beverages to be found on the market, is based, in part at least, on testimony which is not a part of the printed record. By agreement of the parties, approved by the Patent Office, the testimony in this case was taken contemporaneously with the testimony in certain court proceedings pending between the same parties. Certain testimony taken by the applicant was not entitled as testimony to be used in this proceeding before the Patent Office. A type-

written copy thereof was introduced by the opposer but was not printed. This testimony might have been used by either party, had it been printed as required by the rules. Because neither party printed the same it was ruled at the hearing, after reading the agreements relative thereto (Applicant's Record, page 66; Applicant's Brief, pp. 157 to 161), that the unprinted testimony should not be considered in behalf of either party to the interference.

Applicant's argument to the effect that "Koke" is a generic term used by many persons as a name for a class of drinks is not dependent solely upon the unprinted portion of applicant's record. Evidence in support of such a use of that term is to be found in the printed records of both parties (see testimony of Boylin, Qs. 52 to 64, Applicant's Record, pp. 216, 217; Sidebottom, XQs. 110, 111, Applicant's Record, p. 254; Brown, Q. 14, Opposer's Record, p. 1039; Christy, XQs. 135, 136, Opposer's Record, p. 1903). Moreover, to such extent as the use of "Koke" as a generic term or name for a class of drinks may be found to constitute a reason for refusing to register the same as a trademark, the use in that sense may be regarded as formally admitted by counsel for applicant (Applicant's Brief, pp. 157, 163, 167, 168).

In view of the rulings which have been made to the effect that the word "Koke" is used to a material extent by persons desiring to purchase coca-cola, and that the same word is frequently used as a generic term or name for a large class of drinks, the applicant's right to register is held to be dependent upon proof that "Koke" was used as a distinguish-

ing mark for applicant's goods prior to the time at which the public began to use that word either as a nickname for "Coca-Cola" or as a generic name for any cola drink (*Stachelberg et al. v. Ponce*, 128 U. S. 686; 46 O. G. 337; *Corbin v. Gould*, 133 U. S. 308; 51 O. G. 622; *Denver Chemical Mfg. Co. v. Lilley et al.*, 216 F. 869). Even should it be found that applicant's alleged prior use is established by the evidence, applicant's right to register may be defeated by proof of abandonment at a subsequent date. The evidence bearing upon these features of the case will now be taken up for consideration.

The applicant has introduced testimony to establish an adoption and use of "Koke" as a distinguishing mark for goods sold by its predecessors as early as the year 1888. If such use is established it would doubtless entitle applicant to register in the absence of evidence of abandonment. Few of the many witnesses who testified as to the use of the word "Koke" as a nickname for "Coca-Cola" attempted to carry such use back farther than from ten to fifteen years and such dates were not established by association with other events or by documentary evidence. A ruling that the word "Koke" was so used to any material extent, prior to the year 1900 would doubtless be unwarranted in view of the testimony upon which it must be based. On the other hand, the opposer contends that the use of "Koke" as a mark for applicant's goods is not established at a date earlier than the year 1909. Use of the word "Koke" at that late date would not entitle applicant to regis-

ter because of the earlier use of the same word as a nickname for "Coca-Cola."

The history of the adoption and use of "Koke" as a name or mark for applicant's product will first be very briefly outlined in accordance with the testimony of J. C. Mayfield, Sr., given during his examination as a witness for applicant. This witness, J. C. Mayfield, Sr., president of the applicant, Koke Company of America, will hereinafter be referred to as "Mayfield," as a convenient means of distinguishing between him and his sons, whose names will be given in connection with their respective initials.

According to Mayfield's testimony, the Pemberton Medicine Company, of Atlanta, Georgia, at the time that partnership was formed, took over Pemberton's entire business including the manufacture and sale of Wine of Coca, Coca-Cola, Globe Flower Cough Syrup, Indian Queen Hair Dye, and several other remedies and preparations. Mayfield testified that he got the coca-cola formula directly from Pemberton, who explained it to him and permitted him to copy it in a note-book. According to his testimony the Pemberton Medicine Company, as a part of its regular business, continued to manufacture and sell Coca-Cola for a few months, after which a dispute arose between Pemberton and the other partners, Murphy, Bloodworth, and Mayfield, as to the company's right to Coca-Cola, and before the end of the year 1888 it was decided that the Company should discontinue the use of the name "Coca-Cola" and market the same product under the name "Koke." Before the end of that year Murphy retired and

Pemberton died. A settlement was made for the purpose of closing out the Pemberton interest, as a result of which Mrs. Pemberton received the formula to the Indian Queen Hair Dye and one-third of the manufactured stock on hand. The business was then continued by Mayfield and Bloodworth.

Mayfield testified that at some time between the years 1890 and 1892, it was decided to get rid of the patent medicines and push "Koke" only. At about this time he claims to have met an old friend named Ealey, who became interested in the "Wine of Coca" and in 1893 a separate company, the Wine of Coca Company, was organized to take over that preparation. In 1895, Mayfield claims to have bought out Bloodworth and to have continued the business in Atlanta as sole proprietor until about the end of the year 1898.

About the end of the year 1898 Mayfield claims to have left Atlanta. He first did a little manufacturing in New Jersey and between the years 1899 and 1909 he became interested in various business establishments in Birmingham, Nashville, and St. Louis. When he went to Birmingham, in 1899, he succeeded in interesting one Brittain in his new drink "Celery-Cola," with which he claimed to have been experimenting in Atlanta. He and Brittain then started a bottling business for the purpose of exploiting "Celery-Cola." From this time on Mayfield claims to have manufactured and sold both "Celery Cola" and "Koke" continuously until 1909 in some one or more of the establishments with which he was connected in the above-mentioned cities. That "Koke"

has been used by Mayfield and the companies with which he has been associated since 1909 does not appear to be disputed (Opposer's Brief, p. 11). This admitted use of applicant's mark during the last six years and the various business organizations with which he has been associated in Texas, Louisiana, and elsewhere, are not at issue in this proceeding and need not be discussed.

That the Pemberton Medicine Company, of Atlanta, Georgia, made and sold, during the period from 1888 to 1898, in containers bearing the label "Koke," a product which was used in the making of a soda-fountain beverage, is held to be established. This ruling is in no manner dependent upon the testimony of Mayfield, himself. It is based upon the testimony of several competent witnesses including one of the original partners, Murphy (Applicant's Record, p. 393); a daughter and a son-in-law of another of the original partners (Banks, Applicant's Record, pp. 516, 525; Miss Marian Bloodworth, applicant's Record, pp. 347, 351, 356, 357), and a friend who visited Mayfield from Alabama about 1892 or 1893 (Holley, Applicant's Record, pp. 373, 374). These witnesses have not been impeached and there is no apparent reason why their testimony should not be accepted as true.

Evidence has been introduced in behalf of the applicant which is believed to warrant the conclusion that Mayfield continued to make and sell a beverage of some kind under the name "Koke" for a short period at least after he left Atlanta. McGraw, an Alabama bottler, testified (Applicant's Record, pp.

421, 422) that he has bottled Koke purchased from Mayfield, "off and on" (Applicant's Record, p. 422) ever since about the year 1900. He admitted that he had lost track of Mayfield at times and has been unable to get the product for periods of time, the extent of which is more or less uncertain. He testified, however, that he bottled and sold Koke during the years 1900, 1901, and 1902, and gave a list of several of his customers (Applicant's Record, pp. 432, 433). It would seem that this testimony as to sales of Koke in 1901, 1902, and 1903, might have been rebutted if not true.

The applicant has introduced the testimony of numerous witnesses to the effect that he continued to manufacture and sell "Koke" during the years 1904 to 1909 when, according to his own testimony, he was most interested in "Celery-Cola" (Applicant's Record, p. 906). The testimony of many of those witnesses is too uncertain and indefinite to be given any weight as evidence.

Casey first testified that Mayfield was selling Koke twelve years ago (Applicant's Record, p. 416). He then testified that he meant eight or nine years (Applicant's Record, p. 418); then said it was "about eight years" (Applicant's Record, p. 418); and admitted that he could not remember the year or date.

Sidebottom testified to knowledge of the use of Koke by Mayfield for eighteen years (Applicant's Record, p. 246). On cross-examination he cut the time down to twelve or fourteen years (Applicant's Record, p. 258) and then admitted that he could not

remember "Koke," but confused the same with "Cola" (Applicant's Rec., p. 259).

Freed, on direct examination, testified that he had bought Koke from Mayfield continuously since about thirteen years ago (Applicant's Rec., p. 262). On cross-examination he first admitted that he did not know anything about "Koke" either as an extract or as a syrup until about seven years ago (Applicant's Rec., pp. 275, 276), and then admitted that he could not remember about "Koke" (Applicant's Rec., pp. 290, 293).

Mayfield's son, S. T. Mayfield, testified that his father continued to manufacture "Koke" at Birmingham until 1908 (Applicant's Rec., p. 545). Although he claims to have been on the road for his father from 1903 until 1908 (Applicant's Rec., pp. 545, 571, 581), selling Koke, Celery-Cola, etc. (Applicant's Rec., p. 588), he could not remember the names of any of the customers to whom he sold Koke (Applicant's Rec., p. 591).

Another of Mayfield's sons, J. W. Mayfield, also claims to have been on the road selling "Koke" for his father from 1903 to 1907 (Applicant's Rec., p. 641), but could not name any of their Koke customers (Applicant's Rec., pp. 686, 690).

But it is deemed unnecessary to make a detailed analysis of the many witnesses who were examined in behalf of the applicant in view of the admissions and contradictory testimony of Mayfield, himself, through whom the applicant claims title, as its immediate predecessor. Mayfield is now the president of the Koke Company of America and must be regarded as

having been at all times, since its first alleged adoption and use, the person most interested in the success of Koke. His conduct and admissions, so far as they raise presumptions which are against the interest of the applicant, must be regarded as of more weight than indefinite and conflicting testimony of other witnesses. It will be shown that his own testimony in support of the applicant's case must be ignored and that his conduct and admissions during the period from 1904 to 1909, and subsequent thereto, as established by the record, warrant the conclusion that he abandoned Koke some time between 1903 and 1909, during which period he was pushing Celery-Cola.

The conclusion that Mayfield is not to be relied upon as a witness in behalf of the applicant and that his testimony in support of applicant's case must be disregarded is clearly warranted in view of his answers to questions asked him when examined as a witness for the opposer during the taking of its testimony in rebuttal. The opposer had introduced evidence to the effect that in the year 1907 one of Mayfield's employees, Rice, had been prosecuted for the alleged theft from Mayfield of a formulae book and some of his stock in trade. On direct examination Mayfield was asked if he were present at the hearing of the case of State v. Rice and had answered (Applicant's Rec., p. 937) "No." After the opposer had established, by evidence in rebuttal, that Mayfield was present and testified in that case, Mayfield offered the explanation that the record is erroneous

and that he had actually answered "Yes" (Opposer's Rec., 2694).

The opposer, in its brief (pp. 36 to 47), has tabulated extracts from Mayfield's testimony as a convenient means for comparing that which he gave in the case of *State v. Rice*, with that given in this case; first, as a witness for the applicant, and subsequently as a witness in rebuttal for the opposer. It is unnecessary, however, to enter into any detailed discussion relative to the contradictions and inconsistencies to be found in Mayfield's testimony or of the testimony which he has submitted in explanation of the same. His conduct as a witness in rebuttal for the opposer is alone sufficient to warrant the conclusion that his testimony cannot be relied upon. Although repeatedly cautioned that if he did not remember the facts he should so state (Opposer's Rec., pp. 2720, 2728, 2729), he persistently answered "Yes" when asked as to certain facts, at the same time admitting that he remembered nothing about the matter (Opposer's Rec., pp. 2746, 2747, Qs. 293 to 297; p. 2726, Qs. 357, 358; p. 2727, Qs. 365, 366; p. 2733, Q. 429; p. 2739, Q. 473). He apparently attached no importance to the fact that he was testifying under oath.

In his testimony in the case of *State v. Rice*, although Mayfield was subjected to an extensive cross-examination relative to his various formulae and as to the business of The J. C. Mayfield Manufacturing Company, he said not a word about "Koke." That was in 1907. He testified that at that time the company was doing nothing except to supply the Celery Cola Company with its specialties, "Celery-Cola" and

“Pepsinola” (Plaintiff’s Rebuttal Exhibits 4, 5, 6 and 7).

In 1911 Mayfield learned that the Murfreesboro Bottling Works, of Murfreesboro, Tennessee, was carrying on some kind of a business under a registered trademark “Koke” (Applicant’s Rec., p. 789). Mayfield’s Company purchased that registration for a material consideration (Defendant’s Exhibit No. 67) without entering into any contest, although Mayfield claims to have used the name “Koke” as a distinguishing mark for his goods continuously since the year 1888. The earliest date of use alleged in the Murfreesboro registration is May 1, 1902 (Defendant’s Exhibit, No. 129). Mayfield admits that he took nothing from the Murfreesboro Bottling Works, as a result of this transaction, other than the certificate of registration. The business and formulae were not transferred (Applicant’s Rec., pp. 860 and 923).

In 1913 Mayfield was notified that an application for registration of the word “Koke” as a trademark for a nonalcoholic beverage was being prosecuted before the U. S. Patent Office by one William L. Bitting of Texas. Instead of contesting an interference with Bitting, whose earliest alleged date of use was November 10, 1898, Mayfield’s Company bought Bitting’s application and had the mark registered to the Koke Company of America as assignee (Applicant’s Rec., pp. 829, 830, 923; Defendant’s Exhibits No. 126 and No. 128). That applicant took nothing from Bitting in the nature of apparatus, labels, formulae or other tangible assets is admitted (Applicant’s

Rec., pp. 921, 922). Applicant purchased nothing but the bare application for trademark registration together with a label registration owned by Bitting (Defendant's Exhibits No. 126 and No. 127).

In the fall of the year 1910, the Koke Companies, of which Mayfield was president, filed applications for registration of "Koke" as a trademark in twenty or more states of the Union (Applicant's Rec., pp. 830 to 835). Certified copies of several of these applications for state registration are found in the record (Plaintiff's Rebuttal Exhibits No. 84 to No. 89). In each instance the application is verified by Mayfield and in no case did he allege a date of use earlier than June, 1909.

Although Mayfield claims to have manufactured and sold Koke continuously from 1888 up to the time when the Koke Company of America was organized in 1911 (Applicant's Rec., p. 808), including the period during which he was in business in Birmingham (Applicant's Rec., p. 785), the opposer has introduced as evidence in rebuttal the testimony of numerous witnesses to the effect that they were employees of Mayfield's Birmingham companies and that they never heard of "Koke" during that period of employment. These witnesses include Mayfield's salesmen, bookkeeper, stenographer, labeler, chemist, bottlers, bottle-washers, shipping clerk, delivery clerk, and draymen (See Opposer's testimony in rebuttal by Ellis, Barclift, Pogue, Moody, Hooper, W. M. Smith, Ensley, Dickson, Brewer, the Andersons, Crawford, Thomas, Bonham, Barrow, Bevell, and Garrett). Mayfield's St. Louis salesman, Leaver,

and his St. Louis chemist, Bohne, also disclaim any knowledge of Koke during their employment by the J. C. Mayfield Manufacturing Company in 1903 and 1904 (Opposer's Rec., pp. 1919, 1930).

The applicant has been unable to produce specimens of any labels, advertising, letter-heads, bills, or other physical exhibits, illustrating the manner in which "Koke" is alleged to have been used prior to the year 1909. As evidence in rebuttal, the opposer, by subpoena *duces tecum*, introduced a number of letters, envelopes, and other papers of the J. C. Mayfield Manufacturing Company and of the Celery Cola Company, of Birmingham, Nashville, and St. Louis, bearing letters signed by Mayfield and dated 1904, 1905 and 1906 (Plaintiff's Rebuttal Exhibits No. 11 to No. 60). In none of these papers does the word "Koke" appear, either in the heading or in the subject matter, although the name "Celery-Cola" is conspicuously set forth in most of them. That these letters are authentic is clearly established (Opposer's Rec., pp. 1556 to 1573, and p. 2765).

In one of the letters (Plaintiff's Rebuttal Exhibit No. 12 (which Mayfield admits (Opposer's Rec., p. 2765) having written to Pogue in 1905, he says, with respect to a case involving his Celery Cola:

"We must win this case for Celery-Cola is my all."

In 1909 Mayfield and others were prosecuted by the United States Government under the "Food and Drugs Act" on the charge of misbranding in connection with sales of Celery Cola in interstate commerce (177 Fed. 765). The charge appears to have been

based upon analyses by the Government chemists who found that Celery-Cola contained cocaine and caffeine. With reference to this prosecution and its effect Mayfield says:

“Well, that went down against us, under those conditions, against Celery-Cola, which virtually murdered it unjustly. My competitors used it against us and I saw it was an uphill pull to try to overcome a thing of that kind. Well, we had had a good trade on Celery-Cola and a good trade on Koke, a pretty fair trade on Pepsi-Nola, and I made up my mind then to give my entire time, push and energy to Koke, because it had not had the black eye that Celery-Cola had.”

(Applicant's Rec., p. 787.)

And again about this same matter Mayfield testified as follows:

XQ. 645. And then some you sent syrup to in barrels with labels on it, Koke labels on it?

A. I did not go into the syrup business very much until 1909 or '10, along there.

XQ. 646. That was when you went into the syrup business.

A. Yes, sir, largely into the Koke syrup business, that was when I had trouble with Celery-Cola and got a black eye, with cocaine in it, the Government found it and then I thought I would naturally have to overcome that and I pushed Koke.

XQ. 647. But Koke had been your biggest seller up to that time?

A. I would not say that.

XQ. 648. How was the proportion between Koke and Celery-Cola up to the time you dropped Celery-Cola practically and took on Koke exclusively?

A. Well, Koke from '88 to 1900, we sold more possibly.

XQ. 649. That Celery-Cola?

A. Celery-Cola for several years, I believe was in the lead.

XQ. 650. That is, up to this suit?

A. Up to this suit, and since then we have done more Koke business because we have pushed it.

(Applicant's Rec., page 872.)

It is the opposer's contention that Mayfield, and the companies in which he was interested, use the name "Koke," for the first time, after the Government prosecution, in 1909, with respect to the misbranding of Celery-Cola. It is the conclusion of this tribunal, however, and is so held, that Mayfield and his business associates did make some use of the word "Koke" as a name for a soda-fountain beverage during the period from 1888 to 1903, after which Mayfield became most active in his efforts to promote Celery-Cola, but that any trademark right which may have been acquired during that period prior to 1903 was clearly abandoned during the following period from 1903 to 1909. Such abandonment of any prior use which may have been made is held to be satisfactorily established by the evidence. Any other conclusion is deemed to be untenable in view of Mayfield's testimony in the case of *State v. Rice, supra*,

his affidavits in his applications for state registration, his purchase without contest of the Murfreesboro registration and the Bitting application, the absence of the word "Koke" in any of the letters and other papers introduced by Pogue (Plaintiff's Rebuttal Exhibits No. 11 to No. 64), his admission in a letter to Pogue in 1905 that Celery-Cola was "his all," and the testimony of the Birmingham and St. Louis employees of the Mayfield companies to the effect that they never heard of the word "Koke" during their employment. This evidence is all consistent with the conclusion that Mayfield had abandoned any use which he had previously made of "Koke" as a trademark and that he readopted the same in 1909 only because the Government prosecution against "Celery-Cola" discouraged him from thereafter attempting to market his goods under that name.

That the applicant acquired nothing by the purchase of the bare trademark registration and application for registration, one from Murfreesboro Bottling Works and the other from Bitting, cannot be seriously questioned. It is so well settled that a trademark cannot be transferred, independently of the business and goodwill in connection with which it has been used, as to render further discussion or the citation of authorities unnecessary.

The ruling which has been made herein, to the effect that applicant's predecessors made some use of the mark "Koke" and abandoned the same prior to its readoption by Mayfield in 1909, is of substantially the same effect in deciding this case as though it had been ruled, in accordance with opposer's contention,

that the mark had never before been used. In 1909 it was too late for applicant to acquire the right to use "Koke" as a trademark (*Stachelberg et al. v. Ponce, Corbin v. Gould, Denver Chemical Mfg. Co. v. Lilley et al., supra*). At that time it was already, as established by the record in this case, a common nickname, throughout certain sections of the country, for opposer's goods. Moreover, according to applicant's own contention, the word "Koke" was then in common use, in many localities, as a generic name for any one of a large number of cola beverages which alone would clearly bar applicant's right to register.

The opposer contends, and has introduced a large amount of evidence as proof, that the applicant has resorted to unfair and unlawful methods of marketing its goods as a competitor; that it has imitated opposer's product and the containers in which it is distributed and sold; that it has sought to induce retailers to wilfully and intentionally substitute and sell its product as that of the opposer; and that it has persistently harrassed those who will not do so. On the other hand, the applicant has submitted evidence to the effect that the opposer has attempted to monopolize the market and has resorted to threats and intimidating measures to prevent the sale by competitors of any product similar to Coca-Cola. Whether these alleged facts are material to the issues which have been raised in the court proceedings, in which the testimony submitted for use in deciding this case is also entitled is a matter with which this tribunal is not concerned. Such testimony is deemed to be entirely irrelevant to any issue which is prop-

erly raised for determination by the notice of opposition and has therefore been disregarded in deciding this case.

The opposition of The Coca-Cola Company is sustained, and it is adjudged that the applicant, Koke Company of America, is not entitled to the registration for which it has made application.

Limit of appeal: June 24, 1916.

H. E. STAUFFER,
Examiner of Interferences.

May 24, 1916.

[On reverse side:] 132,602/17. M. H. M. E. K.

**Certified Copy of Decision of Commissioner of U. S.
Patent Office in Coca-Cola Co. v. Koke Co., No.
1424.**

2—390.

UNITED STATES OF AMERICA,
DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the Records of this Office of the Decision of the Commissioner, dated August 14, 1917, in the matter of

Opposition Number 1,424,
The Coca-Cola Company,
vs.

Trademark for Refreshing Non-Alcoholic Beverage not in the Nature of a Food and a Soda Fountain Syrup.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 8th day of September, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second.

[Seal]

R. F. WHITEHEAD,

Acting Commissioner of Patents.

Recorded Vol. 123, Page 416.

Opp. No. 1424.

Paper No. 111.

J. R. S.

Hearing,

July 27, 1916.

IN THE UNITED STATES PATENT OFFICE.

The Coca-Cola Company,

vs.

Koke Company.

Opposition No. 1424.

Appeal from Examiner of Interferences.

Trademark for Refreshing Non-Alcoholic Beverage not in the Nature of a Food and a Soda Fountain Syrup.

Application of the Koke Company filed June 23, 1913, No. 71,308, published December 9, 1913.

Messrs. HAROLD HIRSCH and FRANK F. REED & EDWARD S. ROGERS, and Messrs. F. L. BROWN and FRANCIS M. PHELPS, for the Coca-Cola Company.

Mr. F. T. H. JOHNSON, for the Koke Company.

There has been much litigation bearing upon the matter here presented. In *United States vs. Coca-Cola Company*, 241 U. S. 265, decided about a year ago, the case was remanded for further proceedings. The outcome of this case may affect the right of the company to apply the name "Coca-Cola" to its product which, I think, would affect the standing of the opposer. But this suit has not according to my latest information, though now under negotiation, been finally disposed of.

Of more direct bearing upon the issues here presented are two district court decisions. The first is the decision of Judge Sawtelle of the District Court of Arizona. The opinion is found in the brief of the Coca-Cola Company before the Commissioner, page 85. The decree was dated September 16, 1916. I understand that the appeal has not been disposed of.

The second decision was in the District Court for the Eastern District of Louisiana. The decree, by Judge Foster, is dated May 24, 1917, and a certified copy was filed with me on the first day of June, 1917.

In each of these decrees there are findings of fact that the word "Koke" is an abbreviation of the name "Coca-Cola" used by the public and by purchasers in designating coca-cola; that the Koke Company of America, and its predecessor, did not adopt or use the name "Koke" until the year 1909; and that it was adopted and used with the deliberate purpose of representing their goods to be the product and manufacture of the Coca-Cola Company.

In the brief for the Koke Company it is urged that

the injury alleged by the opposer must arise from a mark which falls within the inhibition of Section 5 of the Trademark Act. A motion was made by the applicant to dismiss the opposition for failure to state a cause of action. This motion was denied by the First Assistant Commissioner in an opinion dated January 13, 1915 (see Schedules referred to in the brief for the Coca-Cola Company, page 101).

I agree with the contention by the opposer that the mark sought to be registered is not a mark by which the goods of the owner of the mark may be distinguished from other goods of the same class; that it is in fact a mark by which, partly because of popular usage, the goods of the applicant would be confused with the goods of the opposer and that the opposer would therefore be injured by the registration of the mark within the meaning of the statute.

This disposes of the contention by the applicant that the opposer's case must fall because merely an allegation of unfair competition.

The opposer was permitted to amend his notice of opposition. (See the opinion of the First Assistant Commissioner dated September 5, 1914, in the Schedules in the brief for the Coca-Cola Company, page 145.) I agree with the First Assistant Commissioner that the purport of the original and amended notice is broadly the same and set forth in effect the same grounds of opposition.

While it is true that opposition proceedings under the statute are intended to be summary and the rule is therefore strict respecting the time within which

they may be brought and respecting amendments after the statutory period has expired, yet I can see no reason for overturning the deliberate action of the office upon this point. Moreover, it would make little difference in the outcome so far as the Koke Company is concerned whether the point that the word "Koke" is not a distinctive name of the applicant's goods is pressed by an opposer or raised by the office of its own motion as a reason for refusing registration.

The finding of fact as to the use of the name "Koke" arrived at by the examiner of interferences is somewhat different from that by the district courts indicated above. I do not think the difference in the conclusion reached by the examiner of interferences and by the courts important, in view of the showing as to the popular use of the word "Koke" whether as a nickname for "Coca-Cola," as insisted by the opposer, or as a slang name for a whole class of syrups in which caffeine is an ingredient, as contended by the applicant. In any event, the word fails to distinguish applicant's product. Nothing but a clear showing of continuous use, beginning before the word became common on the lips of the public, could justify the office in registering it.

In fact, it is not seen why anyone should wish to adopt such a trademark unless it were to justify the retailer in selling his goods on the ground that they were called for when, in fact, the customer had no such thought in mind in asking for a "Koke."

There is in truth much testimony to which atten-

tion is called in the brief filed on behalf of the Koke Company to just this general effect. I refer to the testimony cited or quoted on pages 167 et seq., under the caption "The nickname or slang expression 'Koke' does not indicate or designate opposer's product exclusively—hence opposer will not be 'damaged' by the registration."

Of the cases cited the one which seems to me to come the closest is what is known as the "Denver Mud" case (Denver Chemical Manufacturing Co. vs. Lilley, 216 Feb. Rep. 869).

This, of course, was not a case of opposition or a question of registration. It did not involve the question whether "Denver Mud" was a proper trademark. It was merely a case of unfair competition. It was claimed by the appellant, who was the manufacturer of antiphlogistine, that if a customer should go into almost any drug-store in almost any part of the globe and ask for "Denver Mud" he would be handed a can of antiphlogistine.

It was specifically held that the term "Denver Mud" was applied by the public to plastic dressings before antiphlogistine was placed on the market. Under this state of facts the conclusion was reached that the owners of the mark "Antiplogistine" had not made out a case of unfair competition.

In the case at bar, however, the question is distinctly presented whether one has the right to adopt as his trademark the popular pseudonym for the goods which he sells. The answer must be in the negative.

The Examiner of Interferences is sustained.

THOMAS EWING,
Commissioner.

August 14, 1917.

[On reverse side:] 132,602/17.

Court of Appeals of the District of Columbia.

No. 1151, Patent Appeal Docket. October Term,
1917.

THE KOKE COMPANY OF AMERICA,
Appellant,

vs.

THE COCA-COLA COMPANY.

**Certified Copy of Decree of Dismissal of Court of
Appeals of District of Columbia in Koke Co. of
America v. Coca-Cola Co.**

Subject Matter: Trademark for Refreshing Non-
Alcoholic Beverage not in the Nature of a Food
and a Soda Fountain Syrup.

Opposition No. 1424.

Appeal from the Commissioner of Patents.

It appearing to the Court that the time within
which the parties are required to deposit the amount
for printing the record in this cause having elapsed,
and they having failed to deposit the same,—

IT IS THEREFORE, in pursuance of the 19th
rule of this court, now here ordered and adjudged

by this court that this appeal be, and the same is hereby, dismissed.

Per MR. CHIEF JUSTICE SMYTH,
January 5, 1918.

A true copy.

[Seal] Test: HENRY W. HODGES,
Clerk of the Court of Appeals of the District of
Columbia.

[Endorsed]: No. 1151. Court of Appeals of the
District of Columbia. October Term, 1917. Order
of Dismissal. Court of Appeals, District of Colum-
bia. Filed Jan. 5, 1918. Henry W. Hodges, Clerk.

*United States District Court, Eastern District of
Louisiana.*

No. 15,064.

THE COCA-COLA COMPANY,

Plaintiff,

vs.

THE SOUTHERN KOKE COMPANY, LTD.,
CRESCENT CITY SELTZ & MINERAL
WATER COMPANY, JAMES L. WRIGHT
and J. C. MAYFIELD,

Defendants.

**Certified Copy of Decree of U. S. District Court,
Eastern District of Louisiana, in Coca-Cola Co.
v. Southern Koke Co. et al.**

This cause came on to be heard and was argued
by counsel, and thereupon, upon consideration
thereof, for the reasons orally assigned, with the

reservation of the right to reduce same to writing, in the event of an appeal herein,

IT IS ORDERED, ADJUDGED AND DECREED:

(1) That the Court has jurisdiction of the subject matter and of the parties to the suit.

(2) That the word "Coca-Cola" is a valid trademark.

(3) That plaintiff is the owner of and alone entitled to use the trademark "Coca-Cola" and that its goods alone can lawfully be sold under that name.

(4) That the words "Koke" and "Dope" are each an abbreviation of the word "Coca-Cola" and are used by the public and by purchasers in designating the plaintiff's product "Coca-Cola."

(5) That the defendant, J. C. Mayfield, did not adopt or make use of the name "Koke" until the year 1909, and that the defendants had and have no right to its use.

(6) That the defendants have no interest in or claim to the trademark "Coca-Cola," the Coca-Cola business or formula and the defendants claim of interest in the Coca-Cola business, the trademark "Coca-Cola" and knowledge of the Coca-Cola formula are without foundation.

(7) That the words "Koke" and "Dope" were adopted and used by the defendants with the deliberate purposes of representing their goods to be the product and manufacture of The Coca-Cola Company.

(8) That the defendants' salesmen were instructed to sell and did sell defendants' product

under the names "Koke" and "Dope" as and for Coca-Cola.

(9) That the defendant, James L. Wright, was not connected with the Southern Koke Company herein referred to in the bill of complaint at the time of the filing of bill of complaint; therefore, injunction is not granted against him.

(10) That the defendants, except as above, and each of them, have infringed the plaintiff's trademark and have been guilty of unfair competition with the plaintiff.

(11) That defendants, The Southern Koke Company, Crescent City Seltz & Mineral Water Company, and each of them, their officers, servants, agents, employees, attorneys, licensees, transferees and assigns, and each and all thereof, and all acting by or under their authority and J. C. Mayfield, his heirs, assigns and all persons claiming under or through him be, and they are each and all perpetually enjoined and restrained from using or employing in connection with the manufacture, advertisement, offering for sale, or sale, of any product not being the genuine product of the plaintiff, the word "Coca-Cola," or any like word, or the word "Koke," or any like word, or the word "Dope," or any like word; from claiming or asserting any right in the name "Koke" or in the name "Dope," or interfering or threatening any prosecution or interference with the use thereof as short names or nicknames of plaintiff's produce, Coca-Cola; from using or employing or authorizing the use or employment of labels, designs or devices identical with or like

the labels, designs or devices of the plaintiff, or the labels, designs or devices used by the defendants and referred to in the bill of complaint herein; from using in connection with the sale or shipment of any product not the plaintiff's barrels or receptacles colored in imitation of the plaintiff's said barrels or receptacles; from stating or representing that the syrup made or sold by defendants, or any of them, is made from the same formula as Coca-Cola syrup, or that defendants, or any of them, know or may rightfully use or employ the Coca-Cola formula; from claiming any interest in or having had an interest in the Coca-Cola business, from claiming any knowledge of the Coca-Cola formula; from coloring any product not the plaintiff's in imitation of or like the color of Coca-Cola without clearly indicating in connection with the sale thereof that the same is the product of defendants and not of the plaintiff, and further, from doing any act or thing, or using any name or names, devices, artifices or contrivances, which may be calculated to represent that any product not of plaintiff's production is the genuine Coca-Cola of plaintiff and that writs of perpetual injunction issue accordingly.

(12) That defendants, and each of them, may be required to account to plaintiff for any and all profits derived by them or any or either of them, and to pay the plaintiff such damages as it may have sustained by reason of the unlawful conduct of defendants and each of them, and that in the event the parties do not agree as to the amount, this cause be referred to a Master in Chancery of this Court,

to take and state an accounting to the plaintiff for any and all such profits and any and all of said damages, with full power to subpoena and order the attendance of witnesses, the taking of depositions and the production of books, papers and documents pertinent to the taking and stating of said account for profits and damages and to report said account and statement of profits and damages aforesaid as by law provided.

(13) That defendants pay the costs of this suit to be taxed, and that upon taxation plaintiff have execution therefor.

(Signed) RUFUS E. FOSTER,
Judge.

May 24, 1917.

CLERK'S OFFICE.

I certify the foregoing to be a true copy from the original record in this office.

WITNESS, my hand and the seal of the said Court, at the city of New Orleans, La., this 7th day of September, A. D. 1917.

[Seal]

H. J. CARTER,
Clerk.

By Hy. J. Loisel,
Deputy Clerk.

[Endorsed]: No. 15,064. U. S. District Court, Eastern District of Louisiana, New Orleans Division. The Coca-Cola Company vs. The Southern Koke Company, Ltd., Crescent City Seltz & Mineral Water Company, James L. Wright & J. C. Mayfield. Copy of Decree Granting Perpetual Injunction, etc.

In the District Court of the United States of America, Eastern District of Tennessee, Southern Division.

No. 53.

UNITED STATES

vs.

FORTY BARRELS AND TWENTY KEGS OF
COCA COLA.

**Certified Copy of Decree of District Court, Eastern
District of Tennessee, Southern Division, in
United States v. Forty Barrels and Twenty
Kegs of Coca-Cola.**

This proceeding coming on to be heard, and it appearing that the claimant, The Coca Cola Company, without admitting the charges of either misbranding or adulteration, but expressly denying same, but stating that it has made certain modifications in the process of its manufacture, and on account of which a decision either way of the question of fact now involved would not be conclusive in any future proceeding against its present product, has, in order to dispose of this libel without the necessity of another trial, and for the sole purpose of disposing of this cause, withdrawn its claim and all other pleadings therein, and it appearing that the United States and said claimant, by their attorneys of record, have consented to the judgment herein;

And it appearing that the monition issued in this case has been heretofore returned, the usual proclamation made, all legal requirements complied with

and that the default of all persons has been duly entered after withdrawal by claimant of this claim and defenses as aforesaid;

NOW, THEREFORE, the premises considered, it is, on motion of the United States, ORDERED, SENTENCED AND ADJUDGED by the Court, now here, and his Honor, the District Judge, by virtue of the power and authority in him vested, doth hereby order, sentence and adjudge that the goods, wares, and merchandise seized in this proceeding be, and the same are hereby forfeited to the United States and that the said The Coca Cola Company pay all costs of this proceedings;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment of forfeiture shall not be binding upon the said The Coca Cola Company or its product except as to this cause and the particular goods seized herein, nor binding upon the claimant or its product as it shall relate to any other cause or proceeding of any kind or character.

AND IT IS FURTHER ORDERED that the said goods, wares or merchandise seized herein, to wit, the forty barrels and twenty kegs of Coca Cola, shall be released to the claimant upon said claimant paying the costs above adjudged and giving sufficient bond, conditioned that the product shall not be sold or otherwise disposed of contrary to the provisions of the Federal Food and Drugs Act, or the laws of any State, Territory, district, or Insular possession of the United States.

In open court, this 12th day of November, 1918.

(Signed) SANFORD,

United States Judge.

O. K.—WM. L. FRIERSON,

Asst. Atty. General.

W. T. KENERLY,

U. S. Atty.

J. B. SIZER,

Atty. for Coca-Cola Co.

HAROLD HIRSCH,

Attorney for the Cola Cola Co.

[Endorsed]: No. 53. United States District Court, Eastern District of Tennessee, Southern Division. The United States versus 40 Barrels and 20 Kegs of Coca Cola. Agreed Order of ——. Dismissal at Defendant's Cost. 12th day of November, 1917. Ent'd Minute Book ——. Horace Van Deventer, Clerk. By Geo. E. Gresham, 10 A. M., Dep. Clk.

The United States of America,
Eastern District of Tennessee,
Southern Division,—ss.

I, Horace Van Deventer, clerk of the District Court of the United States, within and for the District aforesaid, do hereby certify that the foregoing printing and typewriting is a true, full, correct and complete copy of the original final decree on file and remaining of record in my office in the matter of The United States v. 40 Barrels and 20 Kegs of Coca Cola, No. 53.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal of the said District Court, at Chattanooga, Tennessee, this 20th day of April, A. D. 1918.

HORACE VAN DEVENTER,
Clerk.
By Geo. E. Gresham,
Deputy Clerk.

[Endorsed]: No. 53. United States District Court, Eastern District of Tennessee, Southern Division. The United States versus 40 Barrels and 20 Kegs of Coca Cola. Certified Copy Final Decree.

**Certified Copy of Opinion of Hollister, D. J., in
Coca-Cola Co. v. Duberstein, etc., et al.**

The United States of America,
Southern District of Ohio,
Western Division,—ss.

At a stated term of the District Court of the United States, within and for the Western Division of the Southern District of Ohio, begun and held at the city of Dayton, in said District, on the first Monday in November, being the fifth day of said month, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second, to wit: On Tuesday the 19th day of March, A. D. 1918. Present: The Honorable HOWARD C. HOLLISTER, Judge.

Among the proceedings then and there had were the following, to wit:

*District Court of the United States, Southern
District of Ohio, Western Division.*

No. 13 (Dayton).

THE COCA-COLA COMPANY,

Complainant,

vs.

BENJAMIN DUBERSTEIN, Doing Business as
DAYTON MINERAL WATER COMPANY
et al.,

Defendants.

Beginning in 1886 complainant's predecessors had built up a large business in a syrup in which there was an infusion of an extract of coca shrub and of cola nuts, the latter made after, it is said, the cocaine is extracted from them. The syrup is the basis of a nonintoxicating beverage made by combining it with carbonated water. Since 1892, the complainant has been the exclusive owner and proprietor of the business. The product was named "Coca-Cola" at the beginning and the beverage has been known under that name for more than thirty years. By the expenditure of millions of dollars in advertising it has become well known throughout the land. The name means, and is understood by the public to mean, complainant's product.

The name was registered in 1893 in the Patent Office, and again in 1895, in pursuance of the act of Congress of that year, was registered. The bottles

in which it is sold are of uniform size and appearance, with the name "Coca-Cola" blown in them, and the caps of the bottles bear the trademark.

The defendant, Duberstein, a bottler of soft drinks at Dayton, Ohio, under the name of Dayton Mineral Water Co., bottles a product purchased by him from one John D. Fletcher, who calls his product, "John D. Fletcher's Carbonated Syrup, a Genuine Coca and Cola Flavor." He was the president of the Nashville Syrup Co., enjoined from making and selling "Fletcher's Coca-Cola" (215 Fed. 527, C. C. A. 6). The bottles in which Duberstein sells the product to the other defendants, saloon-keepers, etc., at Dayton and vicinity, are approximately of the same size as Coca-Cola bottles, and in them is blown the words "Coca and Cola." The "and" is in small type, and the "Coca," "Cola" in script imitating the script of the genuine Coca-Cola trademark.

The defendant Coshocton Glass Co. is the maker of bottles for Duberstein.

The validity of complainant's trademark as the exclusive property of complainant has been established in a number of cases elsewhere and in this circuit. (Coca-Cola Co. v. Nashville Syrup Co., 200 Fed. 153; 215 Fed. 527, C. C. A. 6.)

Defendant's product is colored to an exact imitation of the color of complainant's by the use of caramel which serves no other purpose. The cap on defendant's bottles contains the name "Coca and Cola" in red, with other descriptions indicating that the contents is a flavor of Coca and Cola. There is no trace of the coca shrub or cola nuts or coca leaves in

it. The testimony shows conclusively that it was intended to deceive the consuming public and in many proved instances did deceive; but aside from this, the appearance, coloring, size, caps, the delivery slips, the name "Coca and Cola" blown in the bottle, make the product on its face a fraud on the complainant and on the public. The complainant is entitled to an injunction against all the defendants in accordance with its prayer, and for an accounting.

During the progress of the case, Duberstein sold his product as "El-Cola" in the same bottles in which he had been selling "Coca and Cola," covering the words "Coca and Cola," blown thereon, by a diamond-shaped label pasted thereover, on which was printed in large type in white on a diamond-shaped black background, "El-Cola."

By pasting on the label, Duberstein would change his "Coca and Cola" product to "El-Cola," and thereby escape the condemnation he evidently expected "Coca and Cola" would receive in this case. Thereby he is charged by complainant with contempt of court.

This is illustrative of a strange lack of perception on the part of defendant, Duberstein, and by many, as the decisions show, in cases of infringement of trademark and unfair competition, that the courts deal with matters of substance rather than of form and that the odor of fraud is difficult to remove. This case reeks with it. Why does the defendant use the word "Cola" at all? And why color its product as it does? And why adopt the same size of bottle? The only purpose is to appropriate a part of the

value of complainant's trademark and goodwill.

Pasting the label "El-Cola" affords no protection to defendant's illegal act. These bottles are in contact with ice and water all the time while waiting for use. Aside from the instances proved of the labels having become detached, their liability to become detached is so great as not to afford protection even if their permanency would be a protection. *Prest-O-Lite Co. v. Davis*, 209 Fed. 917, aff'd 215 Fed. 349 (C. C. A. 6); *Prest-O-Lite Co. v. Bogen*, 209 Fed. 915; *Prest-O-Lite Co. v. Avery Lighting Co.*, 161 Fed. 648; *Evans v. Von Laer*, 32 Fed. 153; *Wood v. Burgess* (1890), 59 Law Jour., N. S., 11; *Thwaites & Co. v. M'Evilly*, 20 Rep. Pat. Cas. 663, aff'd 21 Rep. Pat. Cas. 397, 401, 402.

It is also proved that defendants' "El-Cola" is palmed off by dealers as "Coca-Cola."

But the label, if permanent, affords no protection. "El-Cola" is in itself an infringement of complainant's trademark "Cola-Cola." Complainant has cited more than twenty-five applicable decisions.

In addition to the injunction plaintiff may take an order finding Duberstein guilty of contempt, the punishment to be determined when the formal order is taken.

(Signed) HOLLISTER,
District Judge.

MATTHEWS & MATTHEWS, HAROLD
HIRSCH, FRANK F. REED, EDWARD S.
ROGERS,

For Complainant.

DALE & KUSWORM,

For Defendant, Benjamin Duberstein.

The United States of America,
Southern District of Ohio,
Western Division,—ss.

I, B. E. Dilley, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and correct copy of the original opinion filed in the case of The Coca Cola Company, vs. Benjamin Rubenstein, doing business as Dayton Mineral Water Company, et al., No. 13 (at Dayton)—In Equity, as the same appears on file and of record in the office of the Clerk of said Court, in the therein entitled cause.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, in the City of Dayton, Ohio, this 6th day of April, A. D. 1918.

[Seal]

B. E. DILLEY,
Clerk.

By Henry H. Hollencamp,
Deputy.

[Endorsed]: No. 13 (at Dayton). United States District Court, Southern District of Ohio, Western Division. The Coca Cola Company vs. Benjamin Duberstein, doing business as Dayton Mineral Water Company, et al. Certified Copy of Opinion.

**Certified Copy of Decree in Coca-Cola Company v.
Duberstein, etc., et al.**

The United States of America,
Southern District of Ohio,
Western Division,—ss.

At a stated term of the District Court of the United States, within and for the Western Division of the Southern District of Ohio, begun and held at the city of Dayton, in said District, on the first Monday in November, being the fifth day of said month, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-second, to wit: On Monday, the 1st day of April, A. D. 1918. Present: The Honorable HOWARD C. HOLLISTER, Judge.

Among the proceedings then and there had were the following, to wit:

*District Court of the United States, Southern
District of Ohio, Western Division.*

IN EQUITY—No. 13 (at Dayton).

THE COCA-COLA COMPANY,

Complainant,

vs.

BENJAMIN DUBERSTEIN, Doing Business as
DAYTON MINERAL WATER COMPANY
et al.,

Defendants.

This cause came on to be heard at this term and was argued by counsel and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows:

That the name "Coca-Cola" is a good and valid trademark and is the exclusive property of the complainant and means and is understood to mean complainant's product and nothing else. That the defendants, by the use of the names "Coca and Cola" and "El-Cola" have infringed said trademark and have been guilty of unfair trading with complainant.

That the defendants Benjamin Duberstein, doing business as Dayton Mineral Water Company; Martin Hornung, George Soto, Peter Kolleda, Joseph F. Waltz, C. J. Stumpf and C. A. Stumpf, doing business as Stumpf Brothers; and A. L. Hart and W. F. Hart, doing business as A. L. Hart and Son, their officers, agents, servants, employees, attorneys, licensees and assigns, all holding by, through or under them and each of them be and they are hereby perpetually enjoined and restrained from using, in connection with the manufacturing, distributing, advertising, offering for sale or the sale of any product not being the genuine product of the complainant, the name "Coca-Cola" or any like words, "Coca and Cola" or "El-Cola" or any like or similar words or names and further from doing any act or thing or using any name, device, get-up or contrivance which may be calculated to deceive or likely to induce the belief that an article not the complainant's is the complainant's.

And that the defendants and each of them are per-

petually enjoined and restrained from offering for sale or selling "Coca and Cola" or "El-Cola" or any product under any like name or words as hereinbefore described, on demands or calls for "Coca-Cola."

That The Coshocton Glass Company, its officers, agents, servants, employees, attorneys, licensees and assigns, all holding by, through or under it, be perpetually enjoined and restrained from manufacturing any bottle and from selling any bottle with the name "Coca and Cola" thereon and from manufacturing or selling any bottle with the name "El-Cola" or any other like term, name, word or words thereon, and from manufacturing and selling any bottle with a name or device thereon which is a colorable imitation of the trademark of the complainant.

And it is further ordered, adjudged and decreed that the complainant do recover of the defendants the profits, gains and advantages which said defendants or any of them have received or made or which have arisen or accrued to them by the manufacture, use or sale of the infringing product hereinbefore described, and that the complainant do recover from the defendants or each of them the damages resulting therefrom.

And it is further ordered, adjudged and decreed that the said complainant do recover of the defendant Benjamin Duberstein, its costs, charges and disbursements in this suit to be taxed.

It is further ordered, adjudged and decreed that the defendant Benjamin Duberstein, doing business as Dayton Mineral Water Company, deliver to the complainant all bottles, labels, cases and advertising

matter or other printed matter including sales slips, sales books or other matter of any kind and description in his possession or in the possession of any agent, servant, employee, licensee or assign bearing the words "Coca and Cola" or "El-Cola" or any like name, term, word or words.

And it is further ordered, adjudged and decreed that this cause be referred to J. Q. A. Johnson, Jr., who is appointed a Commissioner of this Court to ascertain and take and state and report to this Court an account of the sales of "Coca and Cola" and "El-Cola" sold and marketed by the defendant Benjamin Duberstein, and also the gains, profits, and advantages which said defendant, Benjamin Duberstein, has received or which have arisen or accrued to him from infringing the exclusive rights of the complainant by the manufacture, use or sale of said product and the damages which said complainant has suffered by said infringement.

It is further ordered, adjudged and decreed that said Commissioner shall ascertain, take, state and report to this Court the gains, profits and advantages which the other defendants, to wit, Martin Hornung, George Soto, Peter Kolleda, Joseph F. Waltz, C. J. Stumpf and C. A. Stumpf, doing business as Stumpf Brothers; A. L. Hart and W. F. Hart, doing business as A. L. Hart and Son, have received or which have arisen or accrued to them from infringing the exclusive rights of the complainant by the use and sale of said products and the damages which complainant has suffered by said infringement.

And it is further ordered, adjudged and decreed that the complainant on such shall have the right to cause the examination of the said defendants, their agents, servants, employees, licensees and assigns, *ore tenus* or otherwise, and also the production of the books, vouchers, checks, documents and all papers whatsoever of every kind and description of the said defendants and that said defendants, their agents, employees, servants, licensees or assigns attend for such purposes before said Master from time to time as said Master shall direct.

It is ordered, adjudged and decreed that the defendant Benjamin Duberstein is guilty of contempt of this Court for disobedience of the preliminary injunction heretofore issued and that he shall be punished for said contempt as the Court may hereafter decree.

HOLLISTER, Judge,
District Judge United States District Court Southern District of Ohio, Western Division.

Approved:

_____,
_____,

Solicitors for Complainant,

Approved:

Solicitors for Defendant.

The United States of America,
Southern District of Ohio,
Western Division,—ss.

I, B. E. Dilley, Clerk of the District Court of the United States within and for the District and Division aforesaid, do hereby certify that the foregoing

is a true and correct copy of the original entry filed in the case of The Coca-Cola Company vs. Benjamin Duberstein, doing business as Dayton Mineral Water Company et al., No. 13 (at Dayton) in Equity, as the same appears on file and of record in the office of the Clerk of said Court, in the therein entitled cause.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, in the city of Dayton, Ohio, this 6th day of April, A. D. 1918.

[Seal]

B. E. DILLEY,
Clerk.

By Henry H. Hollencamp,
Deputy.

[Endorsed]: No. 13 (at Dayton). United States District Court, Southern District of Ohio, Western Division. The Coca-Cola Company vs. Benjamin Duberstein, doing business as Dayton Mineral Water Co. et al. Certified Copy of Entry.

Registry Card.

Article No. 831526, 191
...class postage paid.

RECEIVED AND REGISTERED

From F. F. Reed & E. S. Rogers,
Gas Bldg.

Addressed to R. E. Sloan,
Phoenix, Ariz.

Return receipt desired....

Delivery restricted:

To addressee in person..

To addressee or order....Postmaster, per W.

[Stamped Postmark]: Chicago, Ill. Registered.
Apr. 27, 1918.

RECEIVED AND REGISTERED

Article No. 831527, 191

...class postage paid.

From Do.

Addressed to A. B. Littleton,

Chattanooga, Tenn.

Return receipt desired....

Delivery restricted:

To addressee in person..

To addressee or order....Postmaster, per F.

[Stamped Postmark]: Chicago, Ill. Registered.
Apr. 27, 1918.

[Endorsed]: No. 3012. U. S. Circuit Court of Appeals, for the Ninth Circuit. Koke Company of America, Southern Koke Company, Ltd., Koke Company of Texas, Koke Company of Arkansas and Koke Company of Oklahoma, Appellants, vs. The Coca-Cola Company, Appellee. Petition. Filed May 7, 1918. F. D. Monckton, Clerk.

— IN THE —

United States Circuit Court of Appeals for the Ninth Judicial Circuit

FEBRUARY TERM 1917

LUMBERMEN'S TRUST COMPANY,
Trustee,

Appellant,

—VS.—

TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpo-
ration, COMMONWEALTH TITLE
TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE and ALVA FOGG,
administratrix of the estate of Frank-
lin Fogg, deceased,

Appellees.

No. 54 E.

Statement of
Agreed Case
Under Rule 77

TRANSCRIPT OF RECORD

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF THE STATE OF WASHINGTON.

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,

For Appellants.

CHARLES O. BATES,
CHARLES T. PETERSON,

For Appellees.

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— IN THE —

United States Circuit Court of Appeals for the Ninth Judicial Circuit

FEBRUARY TERM 1917

LUMBERMEN'S TRUST COMPANY,
Trustee,

Appellant,

—vs.—

TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA, a corpo-
ration, COMMONWEALTH TITLE
TRUST COMPANY, a corporation,
HORACE FOGG, FRED S. FOGG,
HERBERT GOVE and ALVA FOGG,
administratrix of the estate of Frank-
lin Fogg, deceased,

Appellees.

No. 54 E.

Statement of
Agreed Case
Under Rule 77

TRANSCRIPT OF RECORD

It is stipulated and agreed by the parties hereto that the following statement of the case shall supersede for all the purposes of the appeal all parts of the record; and shall be considered by the Appellate Court as the record on appeal, as provided by Rule 77, of the rules and practice of courts of equity in the United States. It is further stipulated that in printing the record captions, titles, verifications and all such other unnecessary parts as may be agreed upon may be omitted.

Dated, Tacoma, Washington, March 13th, A.D. 1917.

FRANK H. KELLEY, JOHN H. HALL,
ROBERT M. DAVIS, FRANK C. NEAL,

For Appellants.

CHARLES O. BATES,
CHARLES T. PETERSON,

For Appellees.

STATEMENT OF THE CASE.

On the 8th day of February, 1916, the appellant filed its original bill of complaint in the court below, which bill was afterward amended and which amended bill was as follows:

AMENDED BILL OF COMPLAINT.

Lumbermen's Trust Company, a corporation duly organized and existing under the laws of the State of Oregon, having its principal place of business at Portland, Multnomah County therein, and a citizen of said state, brings this its bill of complaint against the Title Insurance & Investment Company of Tacoma, a corporation duly organized and existing under the laws of the State of Washington, having its principal place of business at Tacoma, Pierce County therein, and a citizen of said state; Commonwealth Title Trust Company, a corporation organized and existing under the laws of the State of Washington, having its principal place of business at Tacoma, Pierce County therein, and a citizen of said State; Horace Fogg, a citizen of the State of Washington residing in Tacoma, Pierce County, in said state; Franklin Fogg, a citizen of the State of Washington residing in Tacoma, Pierce County, in said state; Fred S. Fogg, a citizen of the State of Washington residing at Tacoma, Pierce County, in said state, and Herbert H. Gove, a citizen of the State of Washington residing in Tacoma, Pierce County, in said state, and for cause of complaint against said defendants, and each of them, avers:

I.

The plaintiff, Lumbermen's Trust Company, is a corporation duly organized and existing under the laws of the State of Oregon, having a principal place of business in Portland, Multnomah County therein, and is a citizen of the said state, and is authorized and empowered by its charter and articles of association to act as a trustee. The said plaintiff corporation, by re-organization and change of name, is the successor to and endowed with all the rights and powers and responsibilities of the Lumbermen's Trust and Savings Bank, a corporation organized and existing under the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County therein, and a citizen of said state.

II.

The defendant Title Insurance & Investment Company of Tacoma, is a corporation organized and existing under the laws of the State of Washington, having a principal place of business at Tacoma, Pierce County therein, and is a citizen of said state, and is authorized by its articles of association to engage in the manufacture and sale of all kinds of abstracts of title of real estate, abstract books and other records of the transfer of title of real estate, and to engage in the purchase and sale thereof, and generally to transact any and all business incident thereto. Plaintiff is informed and believes, and so alleges on information and belief, that all of the capital stock of the said defendant Title Insurance & Investment Company of Tacoma is owned by defendant Commonwealth Title Trust Company.

III.

The defendant Commonwealth Title Trust Company is a corporation organized and existing under the laws of the State of Washington, having a principal place of business at Tacoma, Pierce County therein, and is a citizen of said state, and is authorized by its articles of association to acquire the good will, rights, properties and assets of all kinds of any person, firm or corporation dealing in abstracts of title or owning an abstract of title plant, and to acquire any and all abstract books, files, records, and all property and matters pertaining thereto.

IV.

The defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, each of them, is a citizen of the State of Washington, residing at Tacoma, Pierce County in said state, and at the time hereinafter mentioned in this complaint, were the sole and only owners of the capital stock of defendant Commonwealth Title Trust Company.

V.

On or about the 2nd day of December, 1911, defendant Title Insurance & Investment Company of Tacoma, for a valuable consideration, made, executed and delivered to the Traders Trust Company of Oregon, a corporation duly organized and existing under the laws of the State of Oregon, having a principal place of business at Portland, Multnomah County therein, and a citizen of said state, its certain promissory notes in the aggregate sum of eighty thousand (\$80,000.00) dollars, said notes being thirty-two (32) in number, each of said notes being for the principal sum of twenty-five hundred

(\$2500.00) dollars, each of said notes bearing interest at five (5) per cent per annum, payable semi-annually on the 7th day of December and the 7th day of June of each year, and maturing as follows, to-wit: The first note maturing on the 7th day of December, 1915, and one note maturing on the 7th day of December of each year thereafter. As part of the said transaction, said defendant Title Insurance & Investment Company of Tacoma made, executed and delivered an agreement in writing of mortgage and pledge of certain personal property set forth and identified therein to the said Traders Trust Company of Oregon, a copy of which agreement is hereto annexed and hereby made a part hereof and marked Exhibit "A."

VI.

On or about the 2nd day of December, 1911, the defendants Commonwealth Title Trust Company, a corporation, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove made, executed and delivered to the said Traders Trust Company of Oregon an instrument of guarantee in writing, whereby the said defendant corporation, Commonwealth Title Trust Company, did guarantee the payment of the first seven (7) of the notes made, executed and delivered by the Title Insurance & Investment Company of Tacoma, as hereinbefore alleged and set forth, in accordance with the terms and conditions of said notes; and further guaranteed the payment of the interest down to and including the interest maturing December 7, 1921, of each and all of the thirty-two (32) notes, in accordance with the terms thereof, made, executed and delivered by the Title Insurance &

Investment Company of Tacoma to the Traders Trust Company of Oregon, as hereinbefore alleged and set forth. A copy of said guarantee in writing is hereto attached and hereby made a part hereof and marked Exhibit "B."

VII.

On or about the 2nd day of December, 1911, the defendant Commonwealth Title Trust Company made, executed and delivered to the Traders Trust Company of Oregon aforesaid its deed of mortgage of certain real property, and the improvements thereon, lying and being in the City of Tacoma, County of Pierce and State of Washington, and conditioned to secure the payment of the interest as it matures on thirty-two (32) certain promissory notes of twenty-five hundred (\$2500.00) dollars each, made by the Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon, dated December 11, 1911, and bearing interest at five (5) per cent per annum, payable semi-annually, down to and including the interest maturing on December 7, 1921, and to secure the principal of the first seven (7) of the said notes, the first of said notes maturing upon December 7, 1915, and one on December 7th of each year thereafter down to and including the year 1921. A copy of said deed of mortgage hereto is attached and hereby made a part hereof and marked Exhibit "C."

VIII.

On or about September —, 1913, the Traders Trust Company of Oregon made, executed and delivered to the Lumbermen's Trust & Savings Bank of Oregon aforesaid an assignment of said mortgage deed of the

Commonwealth Title Trust Company, as hereinbefore alleged and set forth and attached hereto as Exhibit "C," which assignment was duly filed of record in the office of the Auditor of Pierce County, Washington, on December 4, 1913, and at the same time made, executed and delivered to the said Lumbermen's Trust & Savings Bank aforesaid endorsements of the thirty-two (32) notes of the Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon aforesaid, and an assignment of the agreement of mortgage and pledge between the Title Insurance & Investment Company of Tacoma and the Traders Trust Company aforesaid, hereinbefore alleged and set forth and attached hereto as Exhibit "A," and an assignment of the instrument of guarantee between the Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove to the said Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto as Exhibit "B." Said assignments and endorsements to the Lumbermen's Trust & Savings Bank aforesaid were in trust for the benefit of the Marion Investment Company, a corporation organized and existing under the laws of the State of Oregon, and a citizen of said state; O. M. Smith and Ella M. Smith, each of whom is a citizen and resident of the State of Oregon with power and authority to the said trustee, in the event that the obligation of said notes, mortgage and agreements was complied with and fully performed, to make, execute and deliver any and all receipts, acquittances and conveyances or re-conveyances for and in behalf of its cesque trustents and its assignor, and in the event of default in any or all of

the conditions, obligations and agreements of said notes, mortgages and agreements, to bring suit for the enforcement thereof, and the foreclosure of any and all of the property pledged thereby. Upon the re-organization of the Lumbermen's Trust & Savings Bank as aforesaid, plaintiff Lumbermen's Trust Company became endowed with all the rights, powers and duties of the Lumbermen's Trust & Savings Bank aforesaid in the premises, and assumed its duties and obligations in the premises.

IX.

On December 7, 1914, there became due and payable, by the Title Insurance & Investment Company of Tacoma aforesaid, to the plaintiff, two thousand (\$2000.00) dollars interest upon the thirty-two (32) notes aforesaid. Said sum and no part thereof, was paid by the Title Insurance & Investment Company of Tacoma aforesaid, and upon default due notice thereof was, within ninety (90) days, given to the defendant Commonwealth Title Trust Company and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but said sum of two thousand (\$2000.00) dollars, or any part thereof, was not paid by the said guarantors, or either of them, and there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma, as principal, and by defendant Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove aforesaid said sum of two thousand (\$2000.00) dollars, with interest at five (5) per cent from and after December 7, 1914, in accordance with

the terms of said notes, mortgages and instruments of guarantee hereinbefore alleged and set forth and attached hereto as Exhibits "A," "B" and "C." The payment of said sum has been in default more than one year prior to the beginning of this suit.

X.

On June 7, 1915, there became due and payable, by the Title Insurance & Investment Company of Tacoma aforesaid, to the plaintiff, two thousand (\$2000.00) dollars interest upon the thirty-two (32) notes aforesaid. Said sum, and no part thereof, was paid by the Title Insurance & Investment Company of Tacoma aforesaid, and upon said default due notice thereof was given, within ninety (90) days, to the defendant Commonwealth Title Trust Company and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but said sum of two thousand (\$2000.00) dollars or any part thereof, was not paid by the said guarantors, or either of them, and there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove aforesaid said sum of two thousand (\$2000.00) dollars, with interest at five (5) per cent from and after June 7, 1915, in accordance with the terms of said notes, mortgages and instruments of guarantee hereinbefore alleged and set forth and attached hereto as Exhibits "A," "B" and "C."

XI.

On December 7, 1915, there became due and payable, by the Title Insurance & Investment Company of

Tacoma aforesaid, to the plaintiff, two thousand (\$2000.00) dollars interest upon the thirty-two (32) notes aforesaid. Said sum, and no part thereof, was paid by the Title Insurance & Investment Company of Tacoma aforesaid, and upon said default due notice thereof, within ninety (90) days, was given to the defendant Commonwealth Title Trust Company and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but said sum of two thousand (\$2000.00) dollars, or any part thereof, was not paid by the said guarantors, or either of them, and there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma, as principal, and by defendant Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove aforesaid said sum of two thousand (\$2000.00) dollars, with interest at five (5) per cent from and after December 7, 1915, in accordance with the terms of said notes, mortgages and instruments of guarantee hereinbefore alleged and set forth and attached hereto as Exhibits "A," "B" and "C." On said December 7, 1915, the principal as well as the interest of the first of said thirty-two (32) notes became due and payable by the defendant Title Insurance & Investment Company of Tacoma to the plaintiff, but neither the whole or any part thereof was paid. Due notice of said default of defendant Title Insurance & Investment Company of Tacoma was given to defendant Commonwealth Title Trust Company and to Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, but neither they, nor any of them, have paid the whole or any part of said principal sum, and

there is now due and owing and wholly unpaid from the said Title Insurance & Investment Company of Tacoma, as principal, and the Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, as guarantors, the sum of twenty-five hundred (\$2500.00) dollars with interest from and after December 7, 1915, at five (5) per cent.

XII.

By the terms of the deed of mortgage by the Commonwealth Title Trust Company to the Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto as Exhibit "C," the said defendant Commonwealth Title Trust Company agreed to pay and extinguish all taxes, assessments and other public charges which might, after the execution and delivery of said deed of mortgage, be levied, assessed or charged upon the mortgaged premises prior to such assessment or public charge becoming delinquent, so that the said mortgage should be and remain a first lien upon the mortgaged premises until the debts and moneys secured thereby were fully paid.

Plaintiff avers that the taxes for the year 1912 were not paid upon the mortgaged premises by the Commonwealth Title Trust Company or by any other person in its behalf, and became delinquent in the sum of three hundred fifteen and 56-100 (\$315.56) dollars, principal, and seventy-four and 17-100 (\$74.17) dollars interest. Plaintiff further avers that the taxes for the year 1913 were not paid upon the mortgaged premises by the Commonwealth Title Trust Company, or by any other person in its behalf, and became delinquent in the sum of three

hundred twenty-three and 79-100 (\$323.79) dollars, principal, and seventy-six and 10-100 (\$76.10) dollars, interest, and on June 12, 1914, a certificate of delinquency for said unpaid taxes and the interest thereon was issued to one Dwight Phelps of Tacoma, said certificate being No. 1561-C in the office of the Treasurer of Pierce County. Plaintiff further alleges that the defendant Commonwealth Title Trust Company is thereby in default and has been in default for more than one year before the beginning of this suit. Plaintiff further alleges that the taxes upon said mortgaged property for the year 1914 were not paid by the defendant Commonwealth Title Trust Company, or by any person in its behalf, and became delinquent in the principal sum of three hundred sixteen and 24-100 (\$316.24) dollars and twenty-eight and 47-100 (\$28.47) dollars, interest, and that on the 29th day of May, 1915, a certificate of delinquency of said unpaid taxes was issued to one Dwight Phelps of Tacoma. Plaintiff further avers that both of said certificates of delinquency are now outstanding and unsatisfied, but plaintiff is informed and believes and so alleges on information and belief, that said certificates of delinquency, and both of them, have been assigned by the said Dwight Phelps to the Commonwealth Title Trust Company, or to some person unknown to the plaintiff in behalf of said Commonwealth Title Trust Company.

XIII.

By the terms of the agreement of mortgage and pledge by and between the defendant Title Insurance & Investment Company of Tacoma and the Traders

Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto as Exhibit "A," it is provided that time is of the essence of the agreement, and in the event of the failure of defendant Title Insurance & Investment Company of Tacoma to pay any of its said notes, or the interest thereon, at the time specified therein, and in the event such default shall continue for the period of one (1) year, then the whole of said notes and the indebtedness evidenced thereby shall, at the option of the said Traders Trust Company of Oregon, or its successors or assigns, forthwith and without notice mature, and that said pledge may forthwith be foreclosed, and any interest then in default shall bear interest at the rate of five (5) per cent per annum until paid.

By the terms of the agreement of guarantee by and between defendant Commonwealth Title Trust Company and the several individual guarantors aforesaid and the Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto and marked Exhibit "B," it is provided that time is of the essence of the agreement and in the event of any failure or default in any payment thereby guaranteed, and of the continuance of such default for a period of one year, then the whole amount covered by the said guarantee shall forthwith and without notice become due and payable at the election of said Traders Trust Company of Oregon, its successors and assigns.

By the terms of the deed of mortgage made, executed and delivered by the defendant Commonwealth Title Trust Company to the Traders Trust Company of Oregon, it is provided that upon any default

on the part of defendant Commonwealth Title Trust Company for the payment of the principal or interest, or upon any default of defendant Commonwealth Title Trust Company in keeping or performing any of its agreements in said mortgage set forth, and the continuance of such default for one (1) year, then the Traders Trust Company of Oregon, its successors and assigns, may elect to declare all sums secured by said mortgage due and payable without notice, including the then value of the unpaid guaranteed interest figured on the basis of five (5) per cent and including interest on all defaulted interest at five (5) per cent per annum, and may immediately cause said mortgage to be foreclosed.

By reason of the agreements aforesaid and by reason of the default of the defendants Title Insurance & Investment Company of Tacoma and Commonwealth Title Trust Company, plaintiff, as the successor and assigns of the Traders Trust Company of Oregon aforesaid, hereby elects to and declares the whole of said principal indebtedness, and the whole of the obligation of said guarantee, and the whole of the obligation of said mortgage due and payable.

XIV.

By the terms of the instrument of guarantee by and between the defendant Commonwealth Title Trust Company and Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, on the one hand, and the Traders Trust Company of Oregon, on the other hand, hereinbefore alleged and set forth and attached hereto and marked Exhibit "B," it is provided that so long as the

abstract plant therein referred to is held as security for the payment of the indebtedness, or any part thereof, therein referred to the Commonwealth Title Trust Company will correctly abstract all deeds, mortgages or other conveyances, mechanics' liens, and all miscellaneous records affecting the title to real property in Pierce County, Washington, cause the same to be arranged systematically and sent to the trustee agreed upon, with a proviso, however, that in the event of the payment of the interest and principal of said thirty-two (32) notes, at the time therein specified, or within one (1) year thereafter, then said provisions would be waived, but in the event of any default and the continuance of such default for one (1) year, then the said guarantor Commonwealth Title Trust Company was forthwith to furnish said instruments of record as agreed and to keep said records complete and up to date.

Plaintiff avers that the said guarantor Commonwealth Title Trust Company is in default as hereinbefore alleged, and has failed and neglected to complete the said records in the manner agreed upon, or in any manner, or in any part whatsoever; and plaintiff further avers that the necessary cost and expense of completing said records as agreed upon, and bringing the same down to date as agreed upon, is the sum of twenty thousand (\$20,000.00) dollars.

XV.

By the terms of the contract of guaranty hereto attached and marked Exhibit "B," the defendants Fred S. Fogg, Herbert H. Gove, Horace Fogg, Franklin Fogg agreed and guaranteed to and with Traders Trust

Company of Oregon that the undertakings of the Commonwealth Title Trust Company in said contract expressed and set forth were based upon a valuable consideration, sufficient in law to bind the said Commonwealth Title Trust Company, and that the said undertakings and each and all of them are valid and subsisting obligations of said Commonwealth Title Trust Company. The plaintiff is informed and believes and so alleges on information and belief that the defendant Commonwealth Title Trust Company denies that its said undertakings in said contract of guaranty were based upon a valuable consideration, and denies that any consideration therefor, moving to said defendant corporation, is sufficient in law to bind said corporation and, denies that said undertakings or any of them are valid and subsisting obligations of said corporate defendant. Plaintiff further is informed and believes and so alleges on information and belief that the said corporate defendant, Commonwealth Title Trust Company, asserts that its said agreements in said Exhibit "B" expressed and contained are void and of no binding force upon the said corporate defendant because the same are unconstitutional, void as against public policy, ultra vires and not within the power of the said corporate defendant to make, and are usurious.

XVI.

Plaintiff further avers that by the terms of the deed of mortgage by the defendant Commonwealth Title Trust Company to the Traders Trust Company of Oregon, hereinbefore alleged and set forth and attached hereto and marked Exhibit "C," it is provided that upon

foreclosure the said Traders Trust Company of Oregon, or its successors or assigns, shall be entitled to enter in any such suit or proceeding a judgment for any deficiency remaining due on account of the debt and moneys secured thereby, after the foreclosure sale of the premises described, and it is further provided that the purchaser at any foreclosure sale shall be entitled to the immediate possession of the premises sold; and it is further provided that the debt and all sums thereby secured shall be payable in gold coin of the United States; it is further provided in said mortgage, and in the notes thereby secured that in the event of any suit or proceeding for the recovery of the debt or money thereby secured, or for the foreclosure of said mortgage, the plaintiff in such suit shall have a right to have taxed as costs and included in the judgment or decree rendered therein a reasonable attorney's fee, and plaintiff avers that the sum of ten thousand (\$10,000.00) dollars is a reasonable sum so to be allowed as attorney's fees in this suit.

XVII.

Plaintiff further avers that this suit is of a civil nature in equity, and the amount and matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand (\$3000.00) dollars, and is between citizens of different states.

WHEREFORE, the plaintiff prays that it do have and recover of the defendant Title Insurance & Investment Company of Tacoma, judgment in the sum of eighty thousand dollars (\$80,000.00), with interest thereon in the sum of six thousand dollars (\$6000.00), and interest upon said unpaid interest in the sum of one

hundred fifty dollars (\$150.00) up to and including December 7, 1915, and with interest upon eighty-six thousand one hundred and fifty dollars (\$86,150.00) from December 7, 1915, to the date of the entry of judgment in this suit, less such sum as may be recovered from the defendant Commonwealth Title Trust Company upon its obligation to pay the whole or any part of such principal or interest; and for a degree of foreclosure and sale of the property pledged to secure said indebtedness as set forth in the instrument of pledge hereto attached and marked Exhibit "A."

Plaintiff further prays for judgment against defendant Commonwealth Title Trust Company in the sum of six thousand dollars (\$6000.00), interest due and unpaid December 7, 1915, together with one hundred fifty dollars (\$150.00) interest thereon to said date; and further for judgment against the defendant Commonwealth Title Trust Company for interest upon said eighty thousand dollars (\$80,000.00) and on six thousand dollars (\$6000.00) unpaid interest as aforesaid, from December 7, 1915, until the entry of the decree of this court at the rate of five per cent (5%) per annum; and further for judgment against the defendant Commonwealth Title Trust Company in such sum as, placed at interest to be earned by said eighty thousand dollars from the date of the decree of this court until the 7th day of December 1921; and for the further sum of seventeen thousand five hundred dollars (\$17,500.00) upon the principal indebtedness of the first seven (7) of the thirty-two (32) notes of the Title Insurance & Investment Company of Tacoma aforesaid.

Plaintiff further prays for the judgment and decree of this court that the defendant Commonwealth Title Trust Company forthwith without delay and before any sale of the property pledged to secure the indebtedness of the Title Insurance & Investment Company of Tacoma as set forth in said Exhibit "A," specifically perform its obligation and engagement as set forth in Exhibit "B," to correctly abstract all deeds, mortgages or other conveyances, mechanics' liens and all miscellaneous records, whether herein specifically mentioned or not, affecting the title to real property in Pierce County, Washington, cause the same to be arranged according to fee numbers, bound and properly identified, and deliver to the plaintiff; or in the event that said defendant for any reason shall not be able, or shall refuse to comply with the decree of this court in this regard, for damages against the said defendant in the sum of twenty thousand dollars (\$20,000.00).

Plaintiff further prays that the mortgage upon the property described in said deed of mortgage hereto attached and marked Exhibit "C," may be foreclosed and that the said property may be sold to satisfy the said indebtedness; and in the event it shall appear that the certificates of delinquency now outstanding against said property are not satisfied of record, that such further sum as may be necessary to pay, satisfy and retire said certificates of delinquency and any and all other charges and liens upon said property may be added to and become a part of the principal debt secured by said mortgage; plaintiff further prays that in the event the property so sold shall not, at such sale, bring a sum sufficient to satisfy such indebtedness, as it may then be

determined by final decree of this court, that a judgment for such deficiency in favor of the plaintiff and against the defendant Commonwealth Title Trust Company be rendered and made.

Plaintiff further prays that if for any reason the agreements and undertakings aforesaid of the defendant Commonwealth Title Trust Company be found by the court to be not valid, subsisting and enforceable against the said corporate defendant Commonwealth Title Trust Company, that the plaintiff have judgment, jointly and severally, against the defendants Fred S. Fogg, Herbert H. Gove, Horace Fogg and Franklin Fogg, for such a sum as may be found by the court to be due upon the guaranty of the Commonwealth Title Trust Company.

Plaintiff further prays for the recovery against the defendants, and each of them, of its costs and disbursements in this suit, including an attorney's fee in the sum of ten thousand dollars (\$10,000.00), and for such other and further relief as may in equity be meet and just.

FRANK H. KELLEY,

JOHN H. HALL,

Solicitors for Plaintiff.

Room 717 Tacoma Building, Tacoma, Washington.

Exhibit "A."

WHEREAS, the Title Insurance & Investment Company of Tacoma has been heretofore indebted unto the Title Insurance & Investment Company of Washington, in the sum of eighty thousand (\$80,000.00) dollars, said indebtedness being secured by certain mortgage covering the abstract of title plant and property of said first-named company, which mortgage was filed and recorded on December 9th, 1909, in the office of the auditor of Pierce County, Washington, auditor's fee numbers 305258 and 305259, in Book 23 of Chattel Mortgages, at page 429, which said mortgage was, for a valuable consideration, assigned by the second named company unto the Traders Trust Company, of Oregon, an Oregon corporation, and which said mortgage is contemporaneously with this agreement satisfied of record by the said Traders Trust Company;

NOW, THEREFORE, in consideration of the satisfaction of said mortgage and the delivery to the said The Title Insurance & Investment Company of Tacoma of the notes evidencing said indebtedness,

IT IS AGREED between the Title Insurance & Investment Company of Tacoma, a Washington corporation, first party, and the Traders Trust Company, of Oregon, second party, as follows, to-wit:

I.

First party shall and does, contemporaneously herewith execute and deliver to second party its certain promissory notes in the aggregate sum of eighty thousand (\$80,000.00) dollars, each of said notes being for the principal sum of twenty-five hundred (\$2500.00) dollars, and each bearing interest at five (5%) per cent per annum, payable semi-annually, on the 7th day of December and the 7th day of June of each year, and maturing as follows, to-wit: The first note maturing on the

7th day of December, 1915, and one note maturing each year thereafter.

II.

The first party agrees to and does hereby turn over to the second party the said plant and property of the first party, being the property covered by said mortgage (excepting certain furniture hereinafter referred to), which said plant and property is to be held by said second party in pledge for its security for the payment of said sum of eighty thousand (\$80,000.00) dollars. Said pledge and property shall be forthwith shipped to Portland, Oregon, at the expense of the second party, and it is to be there placed in a vault or other secure place agreed upon by the parties hereto. Said vault or other secure place where said property is placed shall be so constructed that it can only be opened by the use of two (2) keys. One of said keys shall be in the possession of the party of the second part. The other of said keys shall be in the possession of Frank Branch Riley or other person selected by both the parties to this agreement, who shall have written directions whereby access to said plant and property, except for the mere purpose of inspection, shall be allowed either of the parties to this agreement only by the consent of both of such parties. Provided, that upon the production of a certified copy of a decree of foreclosure of this pledge, such decree being entered by any court of competent jurisdiction, the second party shall be entitled to the immediate possession of said key, and to the immediate access thereafter, and control of said plant, the intent hereof being that said plant shall be held by the said trustee primarily to secure the said notes and the provisions of this pledge to the party of the second party. The first party will promptly pay any and all taxes now assessed in the State of Washington against said plant or property, including the taxes which become payable in February,

1912. The second party is to pay any taxes and assessments which may be hereafter levied or assessed against said property during the existence of this agreement, but each party is to pay one-half the storage charges. Upon the full payment of said notes and all of them by the first party to the second party, or its assigns, the said property shall be surrendered to the first party, its successors and assigns, and the key in the possession of the second party shall be surrendered to the first party, its successors and assigns.

III.

The property hereinbefore referred to as not delivered to the second party under the terms of this agreement as a pledge, consists of certain furniture of the agreed value of one thousand dollars (\$1000.00), which has been agreed upon between the parties, and is to be and is taken by the second party in payment of the sum of one thousand dollars (\$1000.00) being certain deferred interest upon the mortgage indebtedness hereinbefore referred to. Said payment does not constitute any payment upon the obligations secured by this agreement of pledge.

IV.

As long as the first party is not in default in the payment of any of the obligations secured by this agreement, and until the foreclosure of this pledge, the second party shall not operate or use said plant.

V.

Time shall be and is of the essence of this agreement and in the event of the failure of the first party to pay any of said notes at the time specified in said notes, or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at

the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge. Defaulted interest shall bear interest at five (5%) per cent per annum from the default until paid.

PROVIDED, that nothing in this paragraph or in this agreement shall be construed to prevent the second party, at its option, from suing upon any unpaid installment of principal and interest, without waiting for the expiration of one (1) year from the date of default, provided ninety (90) days notice of such default shall have first been given in writing to the first party or its assigns.

IN WITNESS WHEREOF, the parties to this agreement have executed the same this 2nd day of December, 1911, by their officers thereunto duly authorized.

**THE TITLE INSURANCE & INVESTMENT
COMPANY OF TACOMA,**

By (sig) H. H. Gove,
Its President.

Attest: (sig.) Jesse Thomas,
Secretary.

TRADERS TRUST COMPANY OF OREGON,

By (sig.) A. D. Willoughby,
Its President.

Attest: (sig.) O. M. Smith,
Secretary.

Exhibit "B."

WHEREAS, the Title Insurance & Investment Company of Tacoma, a Washington corporation, has, for a valuable consideration, executed its certain promissory notes in favor of the Traders Trust Company of Oregon, in the principal sum of eighty thousand (\$80,000.00) dollars, said notes being thirty-two (32) in number, each being for twenty-five hundred (\$2500.00) dollars, each bearing interest at five per cent (5%) per annum, payable semi-annually, and bearing even date herewith; and,

WHEREAS, as additional security for the payment of said notes, and as an inducement to the said Traders Trust Company to accept said notes in lieu of certain other notes which they now hold, and as an inducement to said Traders Trust Company, to discharge of record a certain chattel mortgage which it holds on the abstract plant and other property of the Title Insurance & Investment Company of Tacoma, the undersigned, Commonwealth Title Trust Company, has agreed to execute this instrument, and the Commonwealth Title Trust Company has also agreed to execute a mortgage covering the following described property, to-wit:

"Beginning at a point on the northerly side of South Tenth street, City of Tacoma, distant 80.04 feet westerly of the point of intersection of the northerly line of South Tenth street with the westerly line of 'A' street in said City of Tacoma; thence northerly and parallel with the westerly line of 'A' street 125 feet; thence at right angles westerly 19.69 feet; thence at right angles southerly and parallel with the westerly line of 'A' street 125 feet to the northerly line of said South Tenth street; thence at right angles easterly to the place of beginning.

"And also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

“Beginning at a point on the westerly line of ‘A’ street formed by the intersection of said westerly line of ‘A’ street with the southerly line of lot seven (7), block 902, City of Tacoma; thence westerly along the southerly line of lot seven (7), 120 feet to the easterly line of the alley between said ‘A’ street and Pacific avenue; thence at right angles southerly 10 feet; thence at right angles easterly 120 feet to the westerly line of ‘A’ street; thence at right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley, and wife, dated April 15th, 1901, and recorded in book 166, at page 396.” Said mortgage being of even date herewith, and being made to secure the payment of the first seven of the notes above referred to and also to secure the interest as it matures on the entire purchase price down to and including the time of maturity of the last of said first seven notes;

NOW, THEREFORE, in consideration of the premises, IT IS AGREED between the Commonwealth Title Trust Company and the said Traders Trust Company of Oregon, as follows, to-wit:

The said Commonwealth Title Trust Company does hereby guarantee to and with the Traders Trust Company of Oregon, the payment of the first seven of said notes and each and every of said seven notes, in accordance with their terms and conditions, and further guarantees to and with the said Traders Trust Company of Oregon, the payment of the interest in accordance with the terms of each and all of the thirty-two (32) notes referred to above, at the times specified in each of said notes, down to and including the interest maturing December 7th, 1921; and also guarantees the payment promptly by the Title Insurance & Investment

Company of Tacoma, of the taxes now due or which mature in February, 1912, against the said plant, and other property of the Title Insurance & Investment Company of Tacoma.

IT IS FURTHER AGREED, that time shall be and is of the essence of this agreement of guaranty, and in the event of any failure or default in any payment hereby guaranteed to be made and of the continuance of such default for a period of ninety days, after written notice thereof to the guarantor in writing, the Traders Trust Company of Oregon, its successors or assigns, may bring a proper action against the guarantor, and in the event of the continuance of such default for a period of one year, after such default shall have been made, then the whole amount covered by this guaranty shall forthwith and without notice become due and payable, at the election of said Traders Trust Co.

In the latter event the guarantor shall be liable to the Traders Trust Company of Oregon, its successors and assigns, for the principal of the first seven of said notes, and the interest on all of said thirty-two (32) notes down to the time of the entry of judgment thereon, but not in any event including interest longer than to December 7th, 1921, and the Traders Trust Company of Oregon shall be entitled to judgment for a sum in addition to such principal and interest equal to the then value of the unpaid guaranteed interest on all of said notes, figured on the basis of 5%. The limitation herein contained on the liability of the guarantor is not intended and shall not affect the liability of the Title Insurance & Investment Company of Tacoma.

The Commonwealth Title Trust Company for the same condition does hereby agree that so long as the abstract plant heretofore and now the property of the Title Insurance & Investment Company of Tacoma, is held as security for the payment of said indebtedness or

any part thereof, it will correctly abstract or cause to be abstracted, all deeds, mortgages, or other conveyances, mechanics' liens, and all miscellaneous records, whether herein specifically mentioned or not, affecting the title to real property in Pierce County, Washington, in the same manner as has heretofore been performed by the Commonwealth Title Trust Company, and cause the same to be arranged according to fee numbers or other system, satisfactory to the Traders Trust Company of Oregon, or its assigns, and cause the same to be bound and properly identified in the customary manner, boxed, wrapped and shipped to the trustee chosen by the Title Insurance & Investment Company of Tacoma and the Traders Trust Company of Oregon, in accordance with the terms of a certain agreement of pledge made between the Title Insurance & Investment Company of Tacoma, first party, and the Traders Trust Company of Oregon, second party, of even date herewith, at Portland, Oregon.

PROVIDED, HOWEVER, in consideration of this covenant, the said Traders Trust Company of Oregon, its successors and assigns, does hereby waive the right to demand such "take-offs" so long as each and every of the payments of interest and the principal is made at the times specified in said notes, and each of them, or within one year thereafter, and so long as each and every of the covenants on the part of the Title Insurance & Investment Company of Tacoma, in said agreement of pledge of even date herewith, are kept and performed at the times therein agreed; in the event of such default, and its continuance for one year, however, the undersigned, Commonwealth Title Trust Company, agrees that it will forthwith furnish or cause to be furnished to the Traders Trust Company of Oregon, its successors and assigns, all the "take-offs" necessary to complete said plant in the manner hereinbefore specified and thereafter as long as said plant or any part thereof

is held as security for such indebtedness, it will keep said plant down to date in such manner.

The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg, and Franklin Fogg, in consideration of the acceptance of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration, sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said company.

IN WITNESS WHEREOF, the Commonwealth Title Trust Company and the said individuals, have executed this instrument, the Commonwealth Title Trust Company by its officers duly authorized by resolution of the board of trustees, and of its stockholders, this 2nd day of December, A. D. 1911.

COMMONWEALTH TITLE TRUST
COMPANY,

By (sig.) Horace Fogg, President.

(sig.) Horace Fogg,

(sig.) Franklin Fogg,

(sig.) Fred S. Fogg,

(sig.) Herbert H. Gove.

Attest: Franklin Fogg, Secretary.

Exhibit "C."

THIS INDENTURE WITNESSETH, that Commonwealth Title Trust Company, a corporation organized under the laws of the State of Washington, party of the first part, for and in consideration of the sum of ten dollars (\$10.00) and other valuable consideration in gold coin of the United States of America, to it in hand paid by Traders Trust Company of Oregon, a corporation organized under the laws of the State of Oregon, party of the second part, has granted, bargained and sold, and by these presents does grant, bargain, sell, convey and warrant unto the said party of the second part, and to its successors and assigns, the following described premises, situate, lying and being in the County of Pierce, State of Washington, to-wit:

Beginning at a point on the northerly side of South Tenth street, City of Tacoma, distant 80.04 feet westerly of the point of intersection of the northerly line of South Tenth street with the westerly line of "A" street in said City of Tacoma; thence northerly and parallel with the westerly line of "A" street, 125 feet; thence at right angles westerly 19.69 feet; thence at right angles southerly and parallel with the westerly line of "A" street 125 feet to the northerly line of said South Tenth street; thence at right angles easterly to the place of beginning.

And also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

Beginning at a point on the westerly line of "A" street formed by the intersection of said westerly line of "A" street with the southerly line of lot 7, block 902, City of Tacoma; thence westerly along the southerly line of lot 7, 120 feet to the easterly line of the alley between said "A" street and Pacific avenue; thence at right angles southerly 10 feet; thence at right angles easterly 120 feet to the westerly line of "A" street; thence at

right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 15, 1901, and recorded in book 166 at page 396.

TO HAVE AND TO HOLD, the said premises, with all their appurtenances, unto the said party of the second part, and to its successors and assigns forever; and the said party of the first part, for itself and its successors and assigns does hereby covenant to and with the said party of the second part, its successors and assigns, that it is the owner in fee simple of said premises, that the same are free from all encumbrances, and that it will warrant and defend the title thereto against all lawful claims whatsoever.

THIS CONVEYANCE IS INTENDED AS A MORTGAGE, and is given to secure the payment of the interest as it matures on 32 certain promissory notes of twenty-five hundred dollars (\$2500.00) each made by the Title Insurance & Investment Company of Tacoma, a Washington corporation, to the Traders Trust Company of Oregon, an Oregon corporation, said notes being of even date herewith, and bearing interest at five per cent (5%) per annum, payable semi-annually, the first maturing December 7, 1915, and one maturing each year thereafter down to and including the interest maturing December 7, 1921, which interest down to December 7, 1921, has been guaranteed by first party and to secure the principal of the first seven (7) of said notes, which principal has also been guaranteed by first party.

Said party of the first part hereby agrees to keep the buildings, fences and other improvements upon said premises in as good condition and repair as the same

are now in or may be put into during the continuance of the lien of this mortgage, and shall not commit or permit any waste of said premises until the moneys and debt hereby secured are fully paid.

Said party of the first part hereby agree to pay and extinguish all taxes, assessments and other public charges which may be levied, assessed or charged upon said premises, or upon this mortgage or the notes hereby secured, prior to such assessment or public charges becoming delinquent, and, also, to pay and discharge all prior liens, claims, adverse titles or encumbrances on said premises, so that this mortgage shall be and remain a first lien thereon until the debt and moneys hereby secured are fully paid.

Said party of the first part hereby agree that in the event it shall fail or neglect to make said repairs, and pay and discharge all taxes, assessments and other public charges which may be levied, assessed or charged upon said premises, and pay and discharge all liens, claims, adverse titles and encumbrances on said premises as above agreed, then the said party of the second part, its successors or assigns, may elect to pay and discharge any or all of the same, and cause said repairs to be made, and all moneys so expended and paid, with interest thereon at the rate of — per cent per annum, from the date of such payments or expenditures until the same is wholly repaid, shall be a lien on said premises above described, and be secured by this mortgage and collected in the same manner as the principal debt hereby secured. Upon any default on the part of the party of the first part in the payment of principal or interest when due or in keeping and performing any of the above agreements and the continuance of such default for one year, said party of the second part, its successors or assigns, may elect to declare all sums secured hereby due and payable without notice, including the then value of the

unpaid guaranteed interest figured on the basis of 5%, and including interest on all defaulted interest at 5% per annum, and may immediately cause this mortgage to be foreclosed in the manner provided by law, whether he or they shall elect to pay any of the sums above referred to or not.

Said party of the first part hereby agree that in any suit or other proceeding commenced for the recovery of the debt or moneys hereby secured or for the foreclosure of this mortgage, said party of the second part, its successors or assigns, shall have the right to have taxed as costs and included in the judgment or decree rendered in such suit or proceeding a reasonable attorneys' fee equal to — per cent of the total amount found due.

Said party of the first party hereby agrees that in any suit or other proceeding commenced for the recovery of the debt and moneys hereby secured, or for the foreclosure of this mortgage, the party of the second part, its successors or assigns, shall be entitled to have entered in any such suit or proceeding a judgment for any deficiency remaining due on account of the debt and moneys hereby secured after the foreclosure sale of the premises above described.

Said party of the first part hereby agrees that in case of the foreclosure of this mortgage the purchaser at any sale had thereunder shall be entitled to the immediate possession of the premises so sold, whether the same then be occupied as a homestead or not.

It is mutually agreed and understood that the debt and all sums hereby secured are payable in gold coin of the United States of America.

It is mutually understood and agreed that upon the full performance of the foregoing covenants and agreements at the time and in the manner specified, then this indenture shall be void and a discharge thereof given at

the expense of the party of the first part, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said party of the first part has hereunto signed its corporate name and affixed its corporate seal by its officers hereunto duly authorized this 2nd day of December, 1911.

COMMONWEALTH TITLE TRUST
COMPANY,

Attest: (signed) Franklin Fogg, Secretary.

By (signed) Horace Fogg, President.

Signed, sealed and delivered in the presence of:

(Signed) E. M. Hayden.

(Signed) Jesse Thomas.

(Corporate seal.)

ANSWERS.

The answer of defendant Commonwealth Title Trust Company, which by stipulation stood also as the answers of the individual defendants, was as follows:

Comes now the above-named defendant Commonwealth Title Trust Company, reserving all manner of exceptions that may be had to the insufficiencies, uncertainties and imperfections of plaintiff's complaint, and for answer to so much thereof as it is advised is material to be answered.

I.

Denies that any part of the capital stock of Title Insurance & Investment Company of Tacoma, is owned, or ever has been owned by this defendant.

II.

Denies that Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, are now, or ever have been, the sole and only owners of the capital stock of this defendant.

III.

Admits that on or about the 2nd day of December, 1911, defendant Title Insurance & Investment Company of Tacoma, signed the notes set forth in the fifth paragraph of said complaint, and signed the agreement which is attached to said complaint, marked "Exhibit A," but denies that there was a valuable or lawful consideration, or any consideration for the executing and delivering of said notes and said agreement.

IV.

Admits that on or about the 2nd day of December, 1911, the defendants Commonwealth Title Trust Company, a corporation, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, signed and delivered to the Traders Trust Company of Oregon, a certain paper writing in words and figures as set forth in "Exhibit B," attached to the complaint herein, with the following exception. That the words, "on the part of the individual guarantors" in the twenty-seventh line on the second page of Exhibit "B" were not contained in, and are not a part of said original writing. That the words "Commonwealth Title Trust Company" were contained in said original writing after the word "undersigned," in the third line of the third page of said Exhibit "B," attached to the complaint. That instead of the word "they," being the fourth word in the third line on the third page of said Exhibit "B," attached to the complaint, the original writing contained the word "it."

V.

Admits that on or about the 2nd day of December, 1911, the defendant Commonwealth Title Trust Company signed and delivered to the Traders Trust Company of Oregon, the paper writing, a copy of which is attached to the complaint herein marked "Exhibit C," but denies that there was any valuable or lawful consideration therefor.

VI.

Denies that on the 7th day of December, 1914, or at any time, there became due and payable by Title Insurance & Investment Company of Tacoma to the

plaintiff, two thousand dollars interest, or any sum, upon the thirty-two notes described in the complaint. Admits that said sum of two thousand dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon such alleged default that due, or any, notice thereof was within ninety days, or any time, given to the defendant Commonwealth Title Trust Company, and to the defendants, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of two thousand dollars was not paid by them, or either of them. Denies that there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma as principal, or at all, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, the sum of two thousand dollars, with interest at 5%, from and after December 7th, 1914, or any sum whatever. Denies that payment of said sum has been in default more than one year prior to the beginning of this suit, or at all.

VII.

Denies that on June 7th, 1915, or at all, there became due and payable by the Title Insurance & Investment Company of Tacoma to the plaintiff, two thousand dollars interest upon the thirty-two notes aforesaid, or any sum. Admits that said sum and no part thereof was paid by the Title Insurance & Investment Company of Tacoma aforesaid, but denies that upon such alleged default due, or any, notice thereof was given within ninety days, or at any time, to the defendant Common-

wealth Title Trust Company, and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that said sum of two thousand dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, said sum of two thousand dollars with interest at 5% from and after June 7th, 1915, or any sum.

VIII.

Denies that on December 7th, 1915, there became due and payable by the Title Insurance & Investment Company of Tacoma to plaintiff, two thousand dollars, or any sum, interest upon the thirty-two notes described in the complaint. Admit that said sum of two thousand dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon said alleged default due notice, or any notice thereof, within ninety days, or within any time, was given to the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of two thousand dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg

and Herbert H. Gove, or either of them, said sum of two thousand dollars, with interest at 5% from and after December 7th, 1915, or any sum. Denies that on said December 7th, 1915, the principal, as well as the interest of the first of said thirty-two notes, or any sum, became due and payable by the defendant Title Insurance & Investment Company of Tacoma to the plaintiff, but admits the same were not paid. Denies that due or any notice of said alleged default was given to defendants Commonwealth Title Trust Company and to Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that neither or any of them have paid the whole or any part of said principal sum, but denies that there is now due and owing and wholly unpaid from the said Title Insurance & Investment Company as principal, or otherwise, and the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, as guarantors, or otherwise, the sum of twenty-five hundred dollars, with interest from and after December 7th, 1915, at 5%, or any sum.

IX.

Admits that the taxes on the real estate described in plaintiff's complaint were not paid, and that certificates of delinquency were issued thereon for the taxes for the years 1912, 1913 and 1914, as set forth in the twelfth paragraph of said complaint, and that the defendant Commonwealth Title Trust Company is now the owner and holder of said certificates of delinquency, but this defendant specifically denies each and every of the other allegations in said paragraph twelve.

X.

Denies that by the terms of Exhibit "A" it is provided that in event of the failure of defendant Title Insurance & Investment Company of Tacoma to pay the interest on any of its said notes at the time specified therein, and in the event such default shall continue for the period of one year, then the whole of said notes and indebtedness evidenced thereby shall at the option of the said Traders Trust Company of Oregon, or its successors or assigns, forthwith and without notice mature, and that said pledge may forthwith be foreclosed and any interest then in default shall bear interest at the rate of 5% per annum until paid. Denies that payment of any installment of principal has been in default one year or for 90 days, and denies that 90 days notice of any default in payment of any installment of principal has been given.

XI.

Denies that by the terms of the paper writing attached to the plaintiff's complaint, marked Exhibit "B," the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were to furnish the abstract instruments of record mentioned in the fourteenth paragraph of said complaint, or to keep said records complete and up-to-date, as therein alleged. Denies that the said defendant Commonwealth Title Trust Company, or defendants Franklin Fogg, Horace Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were in default in that regard, and denies that they, or either of them, have failed and neglected to complete the said records in the manner agreed upon,

or in any manner, or in any part whatsoever, and denies that the necessary cost and expense of completing said records and bringing the same down to date is the sum of ten thousand dollars, or any sum whatever.

XII.

Answering paragraph fifteen, of said complaint, this defendant denies that the sum of ten thousand dollars, or any sum greater than \$1500, is a reasonable sum to be allowed as attorneys' fees in any judgment or decree rendered herein in favor of plaintiff.

Second.

And further answering said complaint, and by way of affirmative matter, constituting a first affirmative defense thereto, this answering defendant says:

I.

That plaintiff's bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against this defendant, nor are the facts stated therein sufficient to entitle plaintiff to any relief against this defendant.

Third.

And further answering said complaint, and by way of affirmative matter constituting a second affirmative defense thereto, this answering defendant alleges:

I.

That on December 2nd, 1911, and for a long time prior thereto, defendant Title Insurance & Investment

Company, of Tacoma, was the owner of, and was engaged in actively operating a complete abstract of title plant, consisting of maps, books and records pertaining to real property titles within Pierce County, Washington, at Tacoma, Washington, and was actively engaged in the business of making and selling abstracts of title to real estate situated exclusively in Pierce County, Washington, and in collecting data and information necessary to the efficient operation of said plant, all of which was in opposition to and in competition with a similar business then, and for a long time theretofore conducted by defendant Commonwealth Title Trust Company, who at said time, and for a long time prior thereto, had been the owner of a similar plant, and who was, and for a long time prior thereto had been engaged as a rival and competitor of said defendant Title Insurance & Investment Company of Tacoma, in the making and selling of abstracts of title to real estate situate exclusively in Pierce County, Washington, and in collecting the data and information pertaining to real property titles within Pierce County, Washington, necessary and proper to conduct and maintain an efficient abstract plant. That at said time said defendants Commonwealth Title Trust Company and Title Insurance & Investment Company were, and for a long time prior thereto had been doing practically all of the abstract of title business in said Pierce County, Washington, and that defendant Commonwealth Title Trust Company, a corporation, contemplated and intended to continue indefinitely in said business.

That at the time of entering into said agreement set out in plaintiff's complaint, the indebtedness of Title

Insurance & Investment Company of Tacoma to Traders Trust Company of Oregon, and the interest on the entire indebtedness of eighty thousand dollars, and the mortgage given to secure the same, referred to in the first paragraph of plaintiff's Exhibit "A," were in full force and effect, and that a payment of five thousand dollars on account of the principal and the interest on the entire indebtedness of eighty thousand dollars, were about to become due and payable, and said Title Insurance & Investment Company of Tacoma was unable to pay the same, and had no other assets except said abstract plant, and had so notified said Traders Trust Company of Oregon, the then holder of said indebtedness. That a copy of said mortgage referred to in the first paragraph of said Exhibit "A" is hereto attached marked "Exhibit 1," and made a part hereof for all purposes.

That by the terms of said mortgage it was expressly provided that said Title Insurance & Investment Company of Tacoma should maintain and operate the said abstract office and plant mentioned therein during the entire life of said mortgage, and should make and issue abstracts to customers, solicit business and use its best endeavors to enlarge and build up the business then carried on by the mortgagee, all of which was to be done under the supervision of a person designated by said Traders Trust Company of Oregon, and that in event of a failure by said Title Insurance & Investment Company of Tacoma to pay the interest, or any installment of principal, or any part thereof, said entire indebtedness should at once become due and payable, and said Traders Trust Company of Oregon should have the right to take immediate possession of said entire abstract

plant, and sell the same and apply the proceeds to the payment of said entire indebtedness.

That at said time said Traders Trust Company of Oregon, and one A. D. Willoughby and O. M. Smith and Ella Smith, the last three named persons who were the substantial owners and officers of said Traders Trust Company of Oregon, intended and were threatening to take possession of said abstract plant on December 7, 1911, the date when said interest and installment of principal became due, if the same was paid, and sell said abstract plant and acquire and operate the same as a going concern, in direct competition with the business carried on by the defendant Commonwealth Title Trust Company in said Pierce County.

That for the sole and only consideration, and for the sole and only purpose of removing and restraining the rivalry and competition then existing in the abstract business in Pierce County, Washington, and for the sole and only consideration and purpose of inducing said Traders Trust Company of Oregon and Title Insurance & Investment Company of Washington, and said Willoughby, Smith and wife, referred to in plaintiff's complaint, and any other person or persons who might become purchasers at the foreclosure sale of said plant and business of said Title Insurance & Investment Company of Tacoma, from engaging in or entering into the abstract business in Pierce County, Washington, in competition with this defendant, and for the purpose insofar as possible of giving this defendant a monopoly of such business within said Pierce County, Washington, and for no other purpose, or consideration, the agreements referred to in plaintiff's complaint were entered

into, and in pursuance of said agreements said Traders Trust Company of Oregon took possession of said abstract plant of defendant, Title Insurance & Investment Company of Tacoma, and moved the same to Portland, Oregon, where the same was placed in a secure vault under the joint control of said Traders Trust Company of Oregon, and defendant Title Insurance & Investment Company of Tacoma, to be there kept and not used for any purpose whatsoever during the life of said agreements, and under the conditions therein provided, and said Title Insurance & Investment Company of Tacoma withdrew as a rival and competitor of defendant Commonwealth Title Trust Company in the abstract business in Pierce County, Washington, and discontinued and abandoned said business. That in pursuance of said agreements said Traders Trust Company of Oregon, and said A. D. Willoughby and O. M. Smith and Ella Smith, his wife, refrained from foreclosing said mortgage and pledge on said abstract plant, and refrained from entering the abstract business in Pierce County, Washington, thereby giving the defendant Commonwealth Title Trust Company a practical monopoly of the abstract business in Pierce County, Washington, and thereafter the defendant Commonwealth Title Trust Company did practically all of the abstract of title business transacted, and made and sold practically all of the abstracts of title relating to real property that were made and sold within Pierce County, Washington.

That at the time of the making of said agreements of December 2nd, 1911, as herein alleged, and at all times subsequent thereto, the Marion Investment Company

referred to in plaintiff's complaint was, and now is, owned and controlled by said A. D. Willoughby and wife.

That concurrent with the execution of said agreements of December 2nd, 1911, and as part of the consideration thereof and as a part of said transaction, said A. D. Willoughby and O. M. Smith, made, executed and delivered their certain agreement in writing wherein they agree not to transact or engage in the abstract of title business in Pierce County, Washington, during the period covered by said agreements, which said agreement with said Willoughby and Smith is hereto attached marked "Exhibit 2," and made a part hereof for all purposes. That all of said agreements mentioned in said complaint were prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and such of said agreements as were executed by the officers of said Commonwealth Title Trust Company, as in this answer alleged, were executed at the instance of said Traders Trust Company, said A. D. Willoughby and O. M. Smith, and pursuant to a resolution of authority therefor prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and by them presented to defendant Commonwealth Title Trust Company for adoption, a copy of which said resolution is hereto attached marked Exhibit "3," and made a part hereof for all purposes.

That defendant is advised by counsel, and therefore alleges the facts to be, that said agreements, and each of them, were and are in violation of the constitution and laws of the State of Washington, and were and are against public policy, illegal and void, and that defendant should not comply with or act said agreement.

Fourth.

By way of a further answer and third affirmative defense to plaintiff's complaint this defendant alleges:

I.

That the defendant Commonwealth Title Trust Company is, and was at all times in the complaint mentioned, and for several years prior thereto, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, and engaged solely in the business of making and selling abstracts of title to lands in Pierce County, Washington, and in making and maintaining an abstract plant at Tacoma, in said County and State. That it was not authorized by its articles of incorporation, nor was it engaged in the business of becoming surety or guarantor for any person, firm or corporation for the contracts, undertakings or obligations of third person.

That the agreement "Exhibit B," and said indenture of mortgage, "Exhibit C," attached to plaintiff's complaint, were each and all made and executed wholly without consideration, and said defendant directly or indirectly never received any consideration or any money or property or labor, or thing of value therefor, or in connection therewith, nor were its assets in any way increased thereby. That defendant is advised by counsel, and therefore alleges the fact to be, that the execution of said instruments and said mortgage, referred to in plaintiff's complaint were, and are each and all in violation of the constitution and laws of the State of Washington, and beyond the powers of this defendant, and

were, and are illegal and void, and the defendant should not comply with or act under said agreements, or recognize the same as valid and binding.

Fifth.

This defendant without admitting any liability whatever upon the agreements and mortgage set forth in plaintiff's complaint, as executed by it, and expressly denying the validity and legality of the same, and denying any liability thereunder, and expressly reserving to itself the defenses hereinbefore in this answer interposed, for a partial defense to plaintiff's complaint alleges:

I.

That the agreement executed by the Commonwealth Title Trust Company, attached to plaintiff's complaint, marked Exhibit "B," contains the following provision:

"It is further agreed, that time shall be and is of essence of this agreement of guaranty, and in the event of any failure or default in any payment hereby guaranteed to be made and of the continuance of such default for a period of ninety days, after written notice thereof to the guarantor in writing, the Traders Trust Company of Oregon, its successors or assigns, may bring a proper action against the guarantor, and in the event of the continuance of such default for a period of one year, after such default shall have been made, then the whole amount covered by this guaranty shall forthwith and without notice become due and payable, at the election of said Traders Trust Co.

"In the latter event the guarantor shall be liable to the Traders Trust Company of Oregon, its successors and assigns, for the principal of the first seven of said

notes and the interest on all of said thirty-two (32) notes down to the time of the entry of judgment thereon, but not in any event including interest longer than to December 7th, 1921, and the Traders Trust Company of Oregon, shall be entitled to judgment for a sum in addition to such principal and interest equal to the then value of the unpaid guaranteed interest on all of said notes, figured on the basis of 5 per cent."

That plaintiff in its complaint in this action is asking and demanding that this Court by its judgment and decree enforce the above mentioned part of this agreement against this defendant, in accordance with the terms thereof. That said portion of said agreement above quoted, and the demand of plaintiff thereunder are usurious, unconscionable and inequitable, and in the nature of a penalty, and not enforceable in a Court of equity.

WHEREFORE, this defendant prays this Honorable Court that this action may be dismissed, that plaintiff take nothing by this action, and that defendant may recover its costs herein expended. And this defendant asks for such other and further relief in the premises as to the Court may seem just and equitable.

BATES, PEER & PETERSON,
Solicitors for Defendant Commonwealth Title Trust
Company, Office and Post Office Address, 1107
Nat'l Realty Bldg., Tacoma, Washington.

EXHIBIT 1.

Know All Men By These Presents, That The Title Insurance & Investment Co., of Tacoma, a corporation duly organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the City of Tacoma, Washington, and hereinafter designated as the mortgagor, in consideration of the sum of Ninety Thousand (\$90,000.00) Dollars, lawful money of the United States to it in hand paid by the Title Insurance and Investment Company of Washington, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business at Tacoma, in said State, and hereinafter designated as the Mortgagee, the receipt whereof is hereby acknowledged does hereby bargain, sell and convey unto the said mortgagee all and singular the following described personal property in possession of the mortgagor, and situated in the City of Tacoma, County of Pierce and State of Washington, said personal property being fully described in a schedule hereunto attached and marked "Schedule A," it being intended to convey all articles of every name, nature and kind now used in carrying on the abstract business of the mortgagor in said City of Tacoma, and which said "Schedule A" is made a part of these presents.

To Have and To Hold the said personal property and every part and parcel thereof to the said mortgagee, its successors or assigns forever. And the said mortgagor for itself its successors and assigns, covenant that it is the lawful owner of the whole of said personal property set forth in "Schedule A" and has good and lawful right to sell and dispose of the same, and that the said personal property is free and clear of encumbrances of every name, nature and kind.

It is further covenanted and agreed on the part of the mortgagor, that it will at all times hereafter and during the life of this instrument, correctly abstract all deeds, mortgages or other conveyances, mechanics' liens, leases and all miscellaneous records affecting the title to real property in Pierce County or filed for record in the office of the County Auditor of Pierce County; also all judgments and decrees of any Court of Record and all probate matters appearing on the records of any Court of Record in Pierce County in the same manner and with the same accuracy and dispatch that the said work has heretofore been performed by the mortgagee and shall cause same to be bound in appropriate volumes in the same manner as the same now are kept by the mortgagee; and that the said volumes so bound shall be properly numbered and identified with the proper fee numbers plainly printed on the back; that the mortgagor shall keep all the said records taken off and from the records and files of Pierce County properly posted in the records of its office in the said City of Tacoma, that is to say, the land books, lot books, miscellaneous books and filing cards in the same manner as heretofore done by the mortgagee. The mortgagor shall at all times keep on hand a sufficient number of said last named books, and filing cards which shall not be inferior in quality to the same class of books or filing cards heretofore maintained by the mortgagee and further agrees that it will replace any and all records of the office pertaining to the abstract business that may from any cause become lost, mutilated or destroyed.

The Mortgagor hereby covenants and agrees that all additional records, books, plats, maps, files, chains of title, furniture, fixtures or appliances of which it shall become the owner during the lifetime of this instrument and used or intended for use in carrying on the abstract business shall become subject to all the terms of this

mortgage as fully as if they were enumerated therein. Provided, however, that the mortgagor shall have the right to sell and dispose of any article of furniture or appliances that may become useless by reason of wear or breakage and supply the place thereof with new articles of the same kind which said furniture or appliances so supplied shall at once become subject to the lien of this mortgage.

It is further covenanted and agreed on the part of the mortgagor that the mortgagee, its representatives or assigns, shall have authority and power to select a competent person, which person shall be satisfactory to the mortgagor and shall be employed by mortgagor at mortgagee's request whose duty shall be to supervise and control the posting, indexing and care of all of the abstract records hereinbefore described, that come into the abstract office of the mortgagor; and whose duty it shall be to see that all said records are properly posted, bound, indexed and labeled in accordance with the terms of this instrument, and said superintendent shall have the custody of all abstracts of records, papers, plats and everything pertaining thereto, and shall see that they are at all times properly protected from fire, theft and destruction. Said mortgagee shall also have exclusive authority to select all employees of the mortgagor whose duties shall be the indexing, posting, and keeping up the abstract records in the abstract office of the mortgagor, which said employees shall also be satisfactory to the mortgagor and shall be employed by mortgagor at mortgagee's request, and said person selected as above shall supervise the work of said employees, and it shall be his and their duty to keep said abstract plant in such manner as shall at all times correctly show the condition of all titles to real property and all incumbrances or liens thereon in Pierce County, Washington. The compensation of said person and of said employees so employed

shall be paid by the mortgagor. Provided, however, that said person and said employees must be competent and industrious persons and qualify to perform the work assigned him, or to them and in the event that he or they or any of them, shall prove to be incompetent, negligent or disabled from any cause, or unsatisfactory to either party, then such person or employee or employees shall be discharged and another person or employee shall be selected by mortgagee and employed by mortgagor as above provided, and the same rule shall be followed from time to time during the life of this mortgage. Such person or employee shall not be discharged by either party without reasonable notice to the other party in advance. Provided, however, that the said person and the said employees hereinbefore referred to shall at all times in the general conduct of the office and the performance of the labor therein, shall be under the supervision and direction of the manager or superintendent of said mortgagor, and shall perform all duties assigned to them not inconsistent with their duties of keeping up and taking care of said abstract plant as hereinbefore set forth. Said mortgagee shall have the right at any and all times to require from said person full reports as to the posting, indexing and keeping up said abstract plant, and shall have the right at all times to inspect said plant for the purpose of seeing that all the provisions of this mortgage are fully complied with.

The mortgagor further covenants and agrees that it will maintain and operate the said abstract office and plant during the entire life of this mortgage and will make and issue abstracts to customers, solicit business and use its best endeavors to enlarge and build up the business, now carried on by the mortgagee.

The mortgagor further agrees that it will at all times maintain its office in a brick, stone or concrete building and will at all times maintain a fire proof vault of suffi-

cient capacity to keep the current files, all bound books and all loose leaf binders, all card indexes of personal property and miscellaneous records and will cause the same to be placed and kept in said vault at all times when said abstract office is closed for business.

The mortgagor hereby covenants and agrees to keep said personal property hereby mortgaged insured against fire in one or more reasonable insurance companies, to be approved and selected by the mortgagee, in the sum of \$10,000.00 or so much thereof as can be obtained. Loss, if any, payable to the mortgagee as its interest may appear, and upon failure of the mortgagor to so insure said property after five days notice to it, then and in that event the mortgagee may insure the same and pay the premium thereon and the same shall be added to and become a part of this mortgage and secured thereby.

Provided, Notwithstanding if the mortgagor or its successors or assigns shall pay or cause to be paid unto the mortgagee, its successors, assigns or legal representatives, the sum of Ninety Thousand (\$90,000.00) Dollars lawful money of the United States, together with interest thereon at the rate of 7 per cent per annum, principal and interest payable according to the terms of ten promissory notes (or any renewal note or notes which may be taken in lieu of the above notes or any of them to evidence the payment of said sum of money or any part thereof) for the respective amounts and dated and due on or before at the respective times following, to-wit:

\$10,000.00 dated December 7, 1909, due December 7, 1910.

\$5,000.00 dated December 7, 1909, due December 7, 1911.

\$5,000.00 dated December 7, 1909, due December 7, 1912.

\$5,000.00 dated December 7, 1909, due December 7, 1913.

\$5,000.00 dated December 7, 1909, due December 7, 1914.

\$5,000.00 dated December 7, 1909, due December 7, 1915.

\$5,000.00 dated December 7, 1909, due December 7, 1916.

\$5,000.00 dated December 7, 1909, due December 7, 1917.

\$5,000.00 dated December 7, 1909, due December 7, 1918.

\$40,000.00 dated December 7, 1909, due December 7, 1919.

Said notes being payable at Tacoma, Washington, and shall keep and perform all the promises and agreements herein contained, then this mortgage shall be void, and of no effect, and its discharge thereof shall be given by said mortgagee, its successors, assigns or legal representatives, at the request of and at the expense of said mortgagor, otherwise to remain in full force and effect.

But if default be made in the payment of the said promissory notes or any of them or the interest thereon or any part thereof when the same shall become due or if any of said personal property be removed or attempt be made to remove the same or any part thereof be attached, levied upon or claimed by any creditor or creditors of said mortgagor or if said mortgagor shall dispose or attempt to dispose of the same or any part thereof without the written consent of the mortgagee or its successors or assigns, or if the said mortgagor shall fail and neglect to take proper care of any of said property or shall fail or neglect to keep any of the covenants and agreements herein contained, then the whole amount of this mortgage shall at once become due and payable notwithstanding any provision herein to the contrary, and it shall be lawful and said mortgagor hereby authorizes said mortgagee or its agents or attorneys to take pos-

session of all the property mentioned herein wheresoever found, without being deemed guilty of trespassing, and shall foreclose this mortgage and sell the said property pursuant to law, and out of the proceeds of said sale to retain the principal and interest remaining on said notes, unpaid, and all costs of such foreclosure and sale together with the sum of \$500.00 as attorney's fees in addition to the other fees provided for herein which the mortgagor hereby agrees to pay in case any suit or proceedings be had to collect the debt hereby secured or any part thereof and said attorney's fees are hereby secured by this mortgage, if suit be settled before judgment and the excess money, if any there be over and above the sum secured hereby after foreclosure sale shall on demand be paid to the said mortgagor, its successors or assigns.

In Witness Whereof, we have hereunto set our hand and affixed our corporate seal this 7th day of December, 1909.

Title Insurance and Investment Company
of Tacoma,

By A. D. Willoughby,
President.

By A. F. Albertson,
Secretary.

(Corporate Seal)

(Here follows a long inventory which is not material to any question on appeal except the following:)

A set of current files embracing a number of volumes properly numbered and identified with the proper fee numbers thereon, and containing an abstracted copy of all deeds, mortgages, or other conveyances, mechanics' liens, leases, and all miscellaneous records affecting the title to real property in Pierce County, or filed for

record in the office of the County Auditor of Pierce County, up to June 1st, 1909, said records containing information full and complete enough to enable any abstract company to compile an abstract as full and complete as the abstracts made and put out heretofore by the Title Insurance and Investment Company of Washington.

“EXHIBIT 2.”

To the Title Insurance & Investment Company of Tacoma, Washington.

Gentlemen:

In consideration of the agreements which have been this day made between you, the Title Insurance & Investment Company of Washington, the Commonwealth Title Trust Company and The Traders Trust Company of Oregon, we, the undersigned individuals, who are the principal stockholders of the Title Insurance & Investment Company of Washington, and of the Traders Trust Company of Oregon, do hereby covenant and agree that as long as the agreements on your part and on the part of the Commonwealth Title Trust Company and on the part of Fred S. Fogg, Horace Fogg, Franklin Fogg and Herbert H. Gove are kept and performed, we will not, nor will either of us, directly or indirectly, as individuals, or through the medium of any corporation, transact an abstract business or a title insurance business in Pierce County, State of Washington.

IN WITNESS WHEREOF, we have hereunto set our hands this 2nd day of December, A. D. 1911.

A. D. Willoughby,
O. M. Smith.

“EXHIBIT 3.”

The following resolution was introduced by Mr. Fred S. Fogg and seconded by Mr. Franklin Fogg and carried by the unanimous vote of all the stockholders and all of the trustees of the Company:

BE IT RESOLVED, that this company at this meeting of the stockholders and trustees, all the stockholders being present in person or by proxy and all of the trustees being present, in consideration of the advantages and benefits accruing to it and arising out of the transaction and as an inducement to the Traders Trust Company of Oregon to cancel and satisfy of record a certain mortgage now held by them and to extend further time upon a certain indebtedness held by them against The Title Insurance & Investment Company of Tacoma, authorize the president to execute a guaranty of the interest upon 32 certain promissory notes of \$2500.00 each, said notes being made by The Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon, and said notes being of date December second, 1911, and bearing interest at 5 per cent per annum, payable semi-annually, the interest which matures December 7, 1921, and that this company also guarantee for the same consideration the principal of the first seven of said notes.

BE IT FURTHER RESOLVED, that this company for the same consideration execute its mortgage covering the following described real property situated in Tacoma, Washington, to-wit:

Beginning at a point on the northerly side of South Tenth Street, City of Tacoma, distant 80.04 feet westerly of the point of intersection of the northerly line of South Tenth Street with the westerly line of “A” Street in said City of Tacoma, thence northerly and parallel with the westerly line of “A” Street, 125 feet, thence at

right angles westerly 19.69 feet, thence at right angles southerly and parallel with the westerly line of "A" Street, 125 feet thence to the northerly line of said South Tenth Street, thence at right angles easterly to the place of beginning; and

Also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

Beginning at a point on the westerly line of "A" Street formed by the intersection of said westerly line of "A" Street with the southerly line of lot 7, block 902, City of Tacoma, thence westerly along the southerly line of lot 7, 120 feet to the easterly line of the alley between said "A" Street and Pacific Avenue, thence at right angles southerly 10 feet, thence at right angles easterly 120 feet to the westerly line of "A" Street, thence at right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 5th, 1901, and recorded in book 166 at page 396.

to secure the payment of said seven notes and said interest on said 32 notes to and including December 7, 1921.

BE IT FURTHER RESOLVED, that this company for the same consideration, execute a guaranty to the Traders Trust Company of Oregon that so long as the abstract plant heretofore and now the property of The Title Insurance & Investment Company of Tacoma is held as security for the indebtedness represented by the 32 certain promissory notes of \$2500.00 each made by The Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon of date December 2nd, 1911, being the notes hereinbefore

referred to that this company will correctly abstract or cause to be abstracted all deeds, mortgages or other conveyances, mechanic's liens and all miscellaneous records whether herein specifically mentioned or not affecting the title to real property in Pierce County in the same manner and with the same accuracy and dispatch that the same work has heretofore been performed by the Commonwealth Title Trust Company, and cause the same be arranged according to fee numbers or other system satisfactory to the Traders Trust Company of Oregon, and cause the same to be bound and properly identified, in the customary manner, boxed, wrapped and shipped to or other trustee selected by The Title Insurance & Investment Company of Tacoma and the Traders Trust Company of Oregon, or their successors or assigns according to the terms of a certain agreement of pledge dated December, 1911. **PROVIDED, HOWEVER,** it shall be agreed in connection with such guaranty that the Traders Trust Company of Oregon shall waive the right to demand such take-offs so long as each and every of the payments of the principal and interest upon said notes and each of them is made at the times specified in said notes and each of them, and so long as each and every of the covenants on the part of The Title Insurance & Investment Company of Tacoma in its agreement of pledge of said date is kept and performed at the times therein agreed, and for a period of one year after default. In the event of such default, and its continuance for one year, however, the Commonwealth Title Trust Company will agree that it will forthwith furnish or cause to be furnished to the Traders Trust Company of Oregon, its successors and assigns, all the take-offs necessary to complete said plant in the manner hereinbefore specified and thereafter so long as said plant or any part of it is held as security for such indebtedness

this company will keep said plant down to date in such manner.

I, Franklin Fogg, Secretary of the Commonwealth Title Trust Company, do hereby certify that the foregoing is a true copy of a resolution duly passed by the stockholders and trustees of the Commonwealth Title Trust Company at a meeting duly called and held, all the trustees and all the stockholders being present, said resolution receiving a unanimous vote.

WITNESS MY HAND and seal of said Company this 2nd day of December, 1911.

Franklin Fogg,
Secretary.

(SEAL)

The answer of the defendant Title Insurance & Investment Company of Tacoma was as follows:

Comes now the above named defendant Title Insurance & Investment Company of Tacoma, reserving all manner of exceptions that may be had to the insufficiencies, uncertainties and imperfections of plaintiff's complaint, and for answer to so much thereof as it is advised is material to be answered.

I.

Denies that any part of the capital stock of Title Insurance & Investment Company of Tacoma, is owned, or ever has been owned by the defendant Commonwealth Title Trust Company.

II.

Denies that Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, are now, or ever have been,

the sole and only owners of the capital stock of the Commonwealth Title Trust Company.

III.

Admits that on or about the 2nd day of December, 1911, defendant Title Insurance & Investment Company of Tacoma, signed the notes set forth in the fifth paragraph of said complaint, and signed the agreement which is attached to said complaint, marked "Exhibit A," but denies that there was a valuable or lawful consideration, or any consideration, for the executing and delivering of said notes and said agreement.

IV.

Admits that on or about the 2nd day of December, 1911, the defendants Commonwealth Title Trust Company, a corporation, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, signed and delivered to the Traders Trust Company of Oregon, a certain paper writing in words and figures as set forth in "Exhibit B," attached to the complaint herein, with the following exception. That the words, "on the part of the individual guarantors" in the twenty-seventh line on the second page of "Exhibit B," were not contained in, and are not a part of the said original writing. That the words "Commonwealth Title Trust Company," were contained in said original writing after the word, "undersigned," in the third line of the third page of said Exhibit "B," attached to the complaint. That instead of the word "they," being the fourth word in the third line on the third page of said Exhibit "B," attached to the complaint, the original writing contained the word "it."

V.

Admits that on or about the 2nd day of December, 1911, the defendant Commonwealth Title Trust Company signed and delivered to the Traders Trust Company of Oregon, the paper writing, a copy of which is attached to the complaint herein marked Exhibit "C," but denies that there was any valuable or lawful consideration therefore.

VI.

Denies that on the 7th day of December, 1914, or at any time, there became due and payable by Title Insurance & Investment Company of Tacoma to the plaintiff, Two Thousand Dollars interest, or any sum, upon the thirty-two notes described in the complaint. Admits that said sum of Two Thousand Dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon such alleged default that due, or any, notice thereof was within ninety days, or any time, given to the defendant Commonwealth Title Trust Company, and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of Two Thousand Dollars was not paid by them, or either of them. Denies that there is now due and owing to the plaintiff by defendant Title Insurance & Investment Company of Tacoma as principal, or at all, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, the sum of Two Thousand Dollars, with interest at 5 per cent, from and after December 7th, 1914, or any sum what-

ever. Denies that payment of said sum has been in default more than one year prior to the beginning of this suit, or at all.

VII.

Denies that on June 7th, 1915, or at all, there became due and payable by the Title Insurance & Investment Company of Tacoma to the plaintiff, Two Thousand Dollars interest upon the thirty-two notes aforesaid, or any sum. Admits that said sum and no part thereof was paid by the Title Insurance & Investment Company of Tacoma aforesaid, but denies that upon such alleged default due, or any, notice thereof was given within ninety days, or at any time, to the defendant Commonwealth Title Trust Company, and to the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that said sum of Two Thousand Dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, said sum of Two Thousand Dollars, with interest at 5 per cent from and after June 7th, 1915, or any sum.

VIII.

Denies that on December 7th, 1915, there became due and payable by the Title Insurance & Investment Company of Tacoma to plaintiff, Two Thousand Dollars, or any sum, interest upon the thirty-two notes described in the complaint. Admits that said sum of Two

Thousand Dollars, and no part thereof was paid by the Title Insurance & Investment Company of Tacoma, but denies that upon said alleged default due notice, or any notice thereof, within ninety days, or within any time, was given to the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, but admits that said sum of Two Thousand Dollars, or any part thereof was not paid. Denies that there is now due and owing to the plaintiff by the defendant Title Insurance & Investment Company of Tacoma, as principal, or otherwise, and by defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, said sum of Two Thousand Dollars, with interest at 5 per cent from and after December 7th, 1915, or any sum. Denies that on said December 7th, 1915, the principal, as well as the interest of the first of said thirty-two notes, or any sum, became due and payable by the defendant Title Insurance & Investment Company of Tacoma to the plaintiff, but admits that the sums were not paid. Denies that due or any notice of said alleged default was given to defendants Commonwealth Title Trust Company, and to Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them. Admits that neither or any of them have paid the whole or any part of said principal sum, but denies that there is now due and owing and wholly unpaid from the said Title Insurance & Investment Company as principal, or otherwise, and the defendants Commonwealth Title Trust Company, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, as guarantors, or otherwise,

the sum of Twenty-five Hundred Dollars, with interest from and after December 7th, 1915, at 5 per cent, or any sum.

IX.

Admits that the taxes on the real estate described in plaintiff's complaint were not paid, and that certificates of delinquency were issued thereon for the taxes for the years 1912, 1913 and 1914, as set forth in the twelfth paragraph of said complaint, and that the defendant Commonwealth Title Trust is now the owner and holder of said certificates of delinquency, but this defendant specifically denies each and every of the other allegations in said paragraph twelve.

X.

Denies that by the terms of Exhibit "A," it is provided that in event of the failure of defendant Title Insurance & Investment Company of Tacoma to pay the interest on any of its said notes at the time specified therein, and in the event such default shall continue for the period of one year, then the whole of said notes and indebtedness evidenced thereby shall at the option of the said Traders Trust Company of Oregon, or its successors or assigns, forthwith and without notice mature, and that said pledge may forthwith be foreclosed and any interest then in default shall bear interest at the rate of 5 per cent per annum until paid. Denies that payment of any installment of principal has been in default one year or for 90 days, and denies that 90 days notice of any default in payment of any installment of principal has been given.

XI.

Denies that by the terms of the paper writing attached to the plaintiff's complaint, marked Exhibit "B," the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were to furnish the abstract instruments of record mentioned in the fourteenth paragraph of said complaint, or to keep said records complete and up-to-date, as therein alleged. Denies that the said defendant Commonwealth Title Trust Company, or defendants Franklin Fogg, Horace Fogg, Fred S. Fogg and Herbert H. Gove, or either of them, were in default in that regard, and denies that they, or either of them, have failed and neglected to complete the said records in the manner agreed upon, or in any manner, or in any part whatsoever, and denies that the necessary cost and expense of completing said records and bringing the same down to date is the sum of Ten Thousand Dollars, or any sum whatever.

XII.

Answering paragraph fifteen of said complaint, this defendant denies that the sum of Ten Thousand Dollars is a reasonable sum to allow as an attorney's fee, and included in the judgment and decree rendered herein, but alleges that no greater sum than Fifteen Hundred Dollars should be allowed as attorney's fees in any judgment or decree rendered here in favor of plaintiff.

Second.

And further answering said complaint, and by way of affirmative matter, constituting a first affirmative defense thereto, this answering defendant says:

I.

That plaintiff's bill of complaint does not state facts sufficient to constitute a valid cause of action in equity against this defendant, nor are the facts stated therein sufficient to entitle plaintiff to any relief against this defendant.

Third.

And further answering said complaint, and by way of affirmative matter constituting a second affirmative defense thereto, this answering defendant alleges:

I.

That on December 2nd, 1911, and for a long time prior thereto, defendant Title Insurance & Investment Company of Tacoma, was the owner of, and was engaged in actively operating a complete abstract of title plant, consisting of maps, books and records pertaining to real property titles within Pierce County, Washington, at Tacoma, Washington, and was actively engaged in the business of making and selling abstracts of title to real estate situated exclusively in Pierce County, Washington, and in collecting data and information necessary to the efficient operation of said plant, all of which was in opposition to and in competition with a similar business then, and for a long time theretofore conducted by defendant Commonwealth Title Trust Company, who at said time, and for a long time prior thereto, had been the owner of a similar plant, and who was, and for a long time prior thereto had been engaged as a rival and competitor of said defendant Title Insurance & Investment Company of Tacoma, in the making and selling of

abstracts of title to real estate situate exclusively in Pierce County, Washington, and in collecting the data and information pertaining to real property titles within Pierce County, Washington, necessary and proper to conduct and maintain an efficient abstract plant. That at said time said defendants Commonwealth Title Trust Company and Title Insurance & Investment Company were, and for a long time prior thereto had been doing practically all of the abstract of title business in said Pierce County, Washington, and that defendant Commonwealth Title Trust Company, a corporation, contemplated and intended to continue indefinitely in said business.

That at the time of entering into said agreement set out in plaintiff's complaint, the indebtedness of Title Insurance & Investment Company of Tacoma to Traders Trust Company of Oregon, and the interest on the entire indebtedness of Eighty Thousand Dollars, and the mortgage given to secure the same referred to in the first paragraph of plaintiff's Exhibit "A," were in full force and effect, and that a payment of Five Thousand Dollars on account of the principal and the interest on the entire indebtedness of Eighty Thousand Dollars, were about to become due and payable, and said Title Insurance & Investment Company of Tacoma was unable to pay the same, and had no other assets except said abstract plant, and had so notified said Traders Trust Company of Oregon, the then holder of said indebtedness. That a copy of said mortgage referred to in the first paragraph of said Exhibit "A" is hereto attached marked Exhibit "1," and made a part hereof for all purposes.

That by the terms of said mortgage it was expressly provided that said Title Insurance & Investment Company of Tacoma should maintain and operate the said abstract office and plant mentioned therein during the entire life of said mortgage, and should make and issue abstracts to customers, solicit business and use its best endeavors to enlarge and build up the business then carried on by the mortgagee, all of which was to be done under the supervision of a person designated by said Traders Trust Company of Oregon, and that in the event of a failure by said Title Insurance & Investment Company of Tacoma to pay the interest, or any installment of principal, or any part thereof, said entire indebtedness should at once become due and payable, and said Traders Trust Company of Oregon should have the right to take immediate possession of said entire abstract plant, and sell the same and apply the proceeds to the payment of said entire indebtedness.

That at said time said Traders Trust Company of Oregon, and one A. D. Willoughby and O. M. Smith and Ella Smith, the last three named persons who were the substantial owners and officers of said Traders Trust Company of Oregon, intended and were threatening to take possession of said abstract plant on December 7, 1911, the date when said interest and installment of principal became due, if the same was not paid, and sell the said abstract plant and acquire and operate the same as a going concern, in direct competition with the business carried on by the defendant Commonwealth Title Trust Company in said Pierce County.

That for the sole and only consideration, and for the

sole and only purpose of removing and restraining the rivalry and competition then existing in the abstract business in Pierce County, Washington, and for the sole and only consideration and purpose of inducing said Traders Trust Company of Oregon and Title Insurance & Investment Company of Washington, and said Willoughby and Smith and wife, referred to in plaintiff's complaint, and any other person or persons who might become purchasers at the foreclosure sale of said plant and business of said Title Insurance & Investment Company of Tacoma, from engaging in or entering into the abstract business in Pierce County, Washington, in competition with the defendant, Commonwealth Title Trust Company, and for the purpose insofar as possible of giving said defendant Commonwealth Title Trust Company a monopoly of such business within said Pierce County, Washington, and for no other purpose, or consideration, the agreements referred to in plaintiff's complaint were entered into, and in pursuance of said agreements said Traders Trust Company of Oregon took possession of said abstract plant of defendant, Title Insurance & Investment Company of Tacoma, and moved the same to Portland, Oregon, where the same was placed in a secure vault under the joint control of said Traders Trust Company of Oregon, and defendant Title Insurance & Investment Company of Tacoma, to be there kept and not used for any purpose whatsoever during the life of said agreements, and under the conditions therein provided, and said Title Insurance & Investment Company of Tacoma withdrew as a rival and competitor of defendant Commonwealth Title Trust Company in

the abstract business in Pierce County, Washington, and discontinued and abandoned said business. That in pursuance of said agreements said Traders Trust Company of Oregon, and said A. D. Willoughby and O. M. Smith and Ella Smith, his wife, refrained from foreclosing said mortgage and pledge on said abstract plant, and refrained from entering in the abstract business in Pierce County, Washington, thereby giving the defendant Commonwealth Title Trust Company a practical monopoly of the abstract business in Pierce County, Washington, and thereafter the defendant Commonwealth Title Trust Company did practically all of the abstract of title business transacted, and made and sold practically all of the abstracts of title relating to real property that were made and sold in Pierce County, Washington.

That at the time of the making of said agreements of December 2nd, 1911, as herein alleged, and at all times subsequent thereto, the Marion Investment Company referred to in plaintiff's complaint was, and now is, owned and controlled by said A. D. Willoughby and wife.

That concurrent with the execution of said agreements of December 2nd, 1911, and as part of the consideration thereof, and as a part of said transaction, said A. D. Willoughby and O. M. Smith, made, executed and delivered their certain agreement in writing wherein they agree not to transact or engage in the abstract of title business in Pierce County, Washington, during the period covered by said agreements, which said agreement with said Willoughby and Smith is hereto attached

marked Exhibit "2," and made a part hereof for all purposes. That all of said agreements mentioned in said complaint were prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and such of said agreements as were executed by the officers of said Commonwealth Title Trust Company, as in this answer alleged, were executed at the instance of said Traders Trust Company, said A. D. Willoughby and O. M. Smith, and pursuant to a resolution of authority therefor prepared by said Traders Trust Company of Oregon, A. D. Willoughby and O. M. Smith, and by them presented to defendant Commonwealth Title Trust Company for adoption, a copy of which said resolution is hereto attached marked Exhibit "3," and made a part hereof for all purposes.

That defendant is advised by counsel, and therefore alleges the facts to be, that said agreements, and each of them, were and are in violation of the Constitution and laws of the State of Washington, and were and are against public policy, illegal and void, and that defendant should not comply with or act under said agreements.

Fourth.

This answering defendant, without admitting any liability whatever upon the agreements, notes and mortgage set out in plaintiff's complaint, and expressly denying the validity and legality of the same, and denying any liability thereunder, and expressly reserving to itself the defenses hereinbefore in this answer interposed, for a partial defense to plaintiff's complaint, alleges:

I.

That the defendant Title Insurance & Investment Company has not been in default in the payment of any installment of principal for one year, and that at the time of the commencement of this action said defendant had not been in default in the payment of any installment of principal for ninety days, and that ninety days notice of any alleged default in the payment of any installment premium had not been given, nor had any notice whatever of any such alleged default been given to the defendant, and that under the terms of the agreement set out in plaintiff's complaint, marked Exhibit "A," plaintiff had no right, power or authority to declare, and could not declare the entire sum evidenced by said notes and agreement to be due and payable, or to foreclose said mortgage or pledge set out in Exhibit "A," or to sue for or recover any part or installment of the principal of said indebtedness.

WHEREFORE defendant prays this Honorable Court that this action may be dismissed, that plaintiff take nothing by this action, and that the defendant may recover its costs herein expended, and this defendant asks for such other and further relief in the premises as to the Court may seem just and equitable.

C. O. BATES,
C. T. PETERSON,
N. H. PEER,
E. FOGG,

Solicitors for defendant Title Insurance & Investment Company. Office and Post Office Address: 1107 National Realty Building, Tacoma, Washington.

Attached to the answer as Exhibits "1," "2," and "3," were Exhibits "1," "2" and "3" of the answer of the Commonwealth Title Trust Company.

STIPULATION.

IT IS STIPULATED by the parties hereto that in addition to facts proven by testimony taken before the Court, the following facts may be taken by the Court as proved by competent evidence, subject to such objection to the materiality or relevancy thereof as either party may raise upon argument. This stipulation shall not be construed to limit the right of either party hereto by direct testimony or upon cross-examination to introduce or to bring out additional or explanatory facts relating to the matters herein stipulated.

I.

Prior to December 7th, 1909, Title Insurance & Investment Company of Washington, a corporation, of which A. D. Willoughby and O. M. Smith and wife were the sole and only stock-holders, owned, maintained and operated in the City of Tacoma, Pierce County, Washington, an abstract business, used and intended to be used for furnishing abstracts of title of property within Pierce County.

Prior to December 7th, 1909, the Commonwealth Title Trust Company, a corporation, of which Horace Fogg, Franklin Fogg, Fred S. Fogg, Herbert H. Gove, Edward Fogg and executors of the estate of Charles S. Fogg, deceased, were the sole stockholders, owned, maintained and operated an abstract plant in the City

of Tacoma, used, and intended to be used, for furnishing abstracts of title to property within Pierce County.

Prior to December 8th, 1909, the Wilson Title & Abstract Company, a corporation, in which R. C. Wilson was substantially the sole stockholder, maintained, owned and operated in the City of Tacoma an abstract business used, and intended to be used, for furnishing abstracts of title to property within Pierce County.

II.

Prior to December 7th, 1909, the aforesaid companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said County, and transacted all of the abstract business therein.

III.

That on the 6th day of December, 1909, the Wilson Title & Abstract Company executed and delivered to A. D. Willoughby, then in the actual management of the Title Insurance & Investment Company aforesaid, and Franklin Fogg, then in the management of the Commonwealth Title Trust Company aforesaid, a lease and option to purchase, a copy of which is hereto attached and marked Exhibit "A," and made a part of this stipulation. That on the 7th day of December, 1909, the said Willoughby by written assignment transferred to said Franklin Fogg, his interest in said lease and option to purchase, a copy of which is attached to the lease Exhibit "A."

IV.

That on the 7th day of December, 1909, the Title Insurance & Investment Co. of Tacoma was organized with the said A. D. Willoughby, A. F. Albertson and F. A. Rice, as incorporators; the capital stock of said corporation being \$5000.00 divided into fifty shares of the par value of One Hundred (\$100.00) Dollars each; that said Willoughby subscribed for forty-eight (48) shares, and Albertson for one share, and Rice for one share; that stock certificates were duly issued on said date to said persons for said amounts of stock; that on said date, defendants, Fred S. Fogg and Franklin Fogg, made, executed and delivered to the said Willoughby an instrument in writing, a true copy of which is in words and figures following:

“THE TACOMA.

Tacoma, Wash., Dec. 7, 1909.

In consideration of One Dollar and other good and valuable considerations, we and each of us hereby promise and agree to indemnify and save harmless A. D. Willoughby from any and all loss, liability or expense because of or by reason of his subscription for forty-eight shares of the capital stock of The Title Insurance & Investment Co. of Tacoma on Dec. 7, 1909.

Fred S. Fogg,
Franklin Fogg.”

That on said date the Title Insurance & Investment Company of Washington conveyed to said Title Insurance & Investment Company of Tacoma its entire abstract plant and property for the total purchase price of One Hundred Thousand Dollars, payable Ten Thou-

sand Dollars in cash, and the balance Ten Thousand Dollars in one year, and Five Thousand Dollars each year thereafter, excepting that the final payment was to be Forty Thousand Dollars, and said Title Insurance & Investment Company of Tacoma paid said Ten Thousand Dollars in cash, and executed and delivered to Title Insurance & Investment Company of Washington its promissory notes for the deferred payments amounting to Ninety Thousand Dollars, and executed and delivered to secure the same its mortgage on said abstract plant property, which is set out in Defendants' Answer and marked "Exhibit 1."

That on said December 7th, 1909, Commonwealth Title Trust Company executed and delivered to Title Insurance & Investment Company of Tacoma its bill of sale to certain abstract records, a copy of said bill of sale is attached hereto marked "Exhibit B," and made a part hereof for all purposes, which property was included in and became a part of the said chattel mortgage aforesaid.

That on the same date Commonwealth Title Trust Company and Title Insurance & Investment Company of Tacoma, and Title Insurance & Investment Company of Washington made, executed and delivered to each other their certain agreement dated December 7th, 1909, a copy of which is attached hereto marked "Exhibit C," and made a part hereof.

That on December 30th, 1909, the said stock certificates in said Title Insurance & Investment Company of Tacoma were endorsed and surrendered by said Wiloughby, Albertson and Rice, and the same were duly

issued to Horace Fogg, Franklin Fogg, Edward Fogg, Herbert H. Gove, Fred S. Fogg and D. I. Fogg, for all of the capital stock of said company, and said stock remained so held until the commencement of this action, and the par value of said stock was afterward duly paid by said stockholders to said Title Insurance & Investment Company of Tacoma.

V.

That at all times mentioned in the complaint and in the answer, the said A. D. Willoughby and O. M. Smith and his wife, were the officers and sole stockholders of the Traders Trust Company of Oregon, the corporation mentioned in said pleadings,

That at all times mentioned in the pleadings in this case A. D. Willoughby and Marian Willoughby, his wife, were the officers and owners and holders of all of the stock of the Marion Investment Company, the corporation mentioned and referred to in said pleadings.

VI.

That on July 22nd, 1911, said Horace Fogg wrote and mailed to the said Willoughby, and said Willoughby received the following letter:

“Tacoma, Washington, July 22nd, 1911.

Mr. A. D. Willoughby,
Portland, Oregon.

Friend Willoughby:—

The abstract business is now so poor that some new plan must be made, as there is not enough business to even pay the running expenses of the two plants, and in addition to that, the new man is coming into active

competition and must be headed off before he has a chance to build up a good plant. If you will give us your share of help, we will still try to pull the thing out OK, as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.

That is, increase the capital stock of our company to four hundred thousand dollars, give you \$80,000, and Wilson \$38,000 preferred stock at 5 per cent, in exchange for your plants, then operate only our plant and as soon as the amount of work increases any, to cut the rate to seventy-five cents and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done and we could make more money for us all by operating one plant at reduced rates than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low abstract rates will keep out competition better than several companies at higher rates would do. At a dollar, the new man would make a little profit on each order, but 75 cents he would lose a little on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent of profit. We could do it because our plant is so complete and we have such a large amount of stock on hand.

By making your stock preferred, you will get your dividends before we get anything at all and will relieve you from all worry or danger of having your plant back on your hands. You would also be able to sell this stock or use it as security much better than you can your present mortgage. We would want to put in some clause giving the company the right to retire preferred stock at certain times and in certain amounts. Kindly take up this plan with Mr. Smith and drop me a line as to what

you think of it and also send any suggestions you may think of as to any better way. Our interests here are mutual and must be worked out together or both plants would be operated at a loss, for the benefit of the public.

Our idea would be to work into title certificates as fast as possible and use every effort to put new additions under the certificate system, and once under a certificate, that addition would be out of reach of any other company. By working for the first few years to keep the field clear rather than to make anything more than interest on the investment, we would have in the course of five or ten years, a business that would be almost out of the line of competition, both on account of the cost of another plant and by that time, we would have a large part of the titles under a certificate system.

Yours truly,

Horace Fogg.”

That on August 3rd, 1911, said Horace Fogg wrote and mailed to said Willoughby, and said Willoughby received the following letter:

“Tacoma, Washington, August 3rd, 1911.

Mr. A. D. Willoughby,
Portland, Oregon.

Dear Mr. Willoughby:—

I am afraid our ideas are too far apart to do us any good. The situation here is so bad that we must have some relief or drop out of our present deals. The plan you suggested would not relieve us any, but would in fact make it far more binding on us, and if we are not able to make enough money to pay the amounts due under the present plan, we would not be able to do so under your plan.

I tried to figure out some plan that would ease us up and at the same time place you in a better and more secure position, and I think the plan suggested by me would do that. You cannot expect to be paid any thing, when both plants are not making anything, but under my scheme, you would get your five per cent interest from the combined earnings before we would get a cent for ourselves, and your principal would be absolutely secure, which to my mind would be a much better situation for you than the present one, although your rate of interest would be a little less than the present speculative one.

Whether or not any deal is made with you or Wilson, the rate will have to be cut to seventy-five cents and we expect to do that at once and with the intention of making it a permanent rate. We can pay expenses at fifty cents if we get most of the business, and both Frank and Mr. Gove thought it the best plan to come back to our own company and make a permanent rate of fifty cents and not try to buy the other plants as long as there was a fourth man in the field whom we had to fight anyway, but I thought I would take it up with you first and get your ideas on the matter before we did anything. It may be that as you are now footloose, you will want to come back here and enter the abstract field again, but with so little work to be done, we could each leave one stenographer in the office to do the work and the rest of the force go out after the four or five orders a day that could be dug up.

If you come up this way, you might drop in and we could talk over the situation anyway.

Yours very truly,

Horace Fogg."

That on August 7th, 1911, said Willoughby wrote and Horace Fogg received the following letter:

“Portland, Oregon,
221 Commercial Club Bldg.,
August Seventh
1911

Mr. Horace Fogg,
109 South 10th Street,
Tacoma,
Wash.

Dear Sir:

Your letter of August third relative to the Abstract situation at Tacoma has been received.

We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition whereby we would be a minority stockholder and therefore have nothing to say in the management of the company.

I expect to be in Tacoma within the next two weeks and will then talk over with you any scheme you may have that will be of mutual benefit to us all. You might bear in mind this fact and that is if we merge the plants as suggested in your letter, our interests must be protected by a guarantee of some kind.

Very truly yours,

A. D. Willoughby.

Dictated by AW/C.

VII.

On December 2nd, 1911, a certified copy of a record of the Title Insurance & Investment Company of Tacoma was received by the Traders Trust Company in words and figures as follows:

"Be it resolved that the Title Insurance & Investment Company of Tacoma execute and deliver thirty-two certain notes dated December 2nd, 1911, in favor of the Traders Trust Company of Oregon for twenty-five hundred dollars each, the first payable on or before December 7th, 1915, and one payable on or before December 7th each year thereafter, with interest at the rate of five per cent per annum, payable semi-annually, and execute and deliver an agreement of pledge of the property and plant of the company to secure said notes; said notes and agreement to be in such form and to contain such provisions as the president of the company may agree upon, and that the president and secretary be authorized to execute said agreement and that the president be authorized to execute said notes.

"I, Jesse Thomas, secretary of Title Insurance & Investment Co. of Tacoma, do hereby certify that the foregoing is a true copy of a resolution duly passed by the trustees of said company at a meeting duly called and held on the 2nd day of December, 1911, a quorum being present, and that the same appears on the minutes of said meeting.

"Witness my hand and the seal of said company this 2nd day of December, 1911.

"(Sig.) Jesse Thomas."

(Corporate seal.)

On December 2nd, 1911, a certified copy of a record of the Commonwealth Title Trust Company was received by the Traders Trust Company of Oregon, in words and figures as follows:

"The following resolution was introduced by Mr. Fred S. Fogg and seconded by Mr. Franklin Fogg and carried by the unanimous vote of all the stockholders and all of the trustees of the company:

"**BE IT RESOLVED**, that this company at this meeting of the stockholders and trustees, all the stockholders being present in person or by proxy, and all of the trustees being present, in consideration of the advantages and benefits accruing to it and arising out of the transaction and as an inducement to the Traders Trust Company of Oregon to cancel and satisfy of record a certain mortgage now held by them and to extend further time upon certain indebtedness held by them against the Title Insurance & Investment Company of Tacoma, authorize the president to execute a guaranty of the interest upon 32 certain promissory notes of \$2500.00 each, said notes being made by the Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon, and said notes being of date December second, 1911, and bearing interest at 5% per annum, payable semi-annually the first maturing December 7, 1915, down to and including the interest which matures December 7, 1921, and that this company also guarantees for the same consideration the principal of the first seven of said notes.

"**BE IT FURTHER RESOLVED**, that this company for the same consideration execute its mortgage covering the following described real property situated in Tacoma, Washington, to-wit:

"Beginning at a point on the northerly side of South Tenth Street, City of Tacoma, distant 80.04 feet west-

erly of the point of intersection of the northerly line of South Tenth street with the westerly line of 'A' street in said City of Tacoma, thence northerly and parallel with the westerly line of 'A' street, 125 feet, thence at right angles westerly 19.69 feet, thence at right angles southerly and parallel with the westerly line of 'A' street 125 feet to the northerly line of said South Tenth street, thence at right angles easterly to the place of beginning.

"And also a right-of-way in, over and along the following described land situated in the said city of Tacoma, to-wit:

"Beginning at a point on the westerly line of 'A' street formed by the intersection of said westerly line of 'A' street with the southerly line of lot 7, block 902, city of Tacoma, thence westerly along the southerly line of lot 7, 120 feet to the easterly line of the alley between said 'A' street and Pacific avenue, thence at right angles southerly 10 feet, thence at right angles easterly 120 feet to the westerly line of 'A' street; thence at right angles northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 15, 1901, and recorded in book 166 at page 396, to secure the payment of said seven notes and said interest on said 32 notes to and including December 7, 1921.

"**BE IT FURTHER RESOLVED**, that this company for the same consideration, execute a guaranty to the Traders Trust Company of Oregon that as long as the abstract plant heretofore and now the property of the Title Insurance & Investment Company of Tacoma, is held as security for the indebtedness represented

by the certain promissory notes of \$2500.00 each made by the Title Insurance & Investment Company of Tacoma in favor of the Traders Trust Company of Oregon of date December 2nd, 1911, being the notes heretofore referred to, that this company will correctly abstract or cause to be abstracted all deeds, mortgages or other conveyances, mechanics' liens and all miscellaneous records whether herein specifically mentioned or not affecting the title to real property in Pierce County, in the same manner and with the same accuracy and dispatch that the same work has heretofore been performed by the Commonwealth Title Trust Company, and cause the same to be arranged according to fee numbers or other system satisfactory to the Traders Trust Company of Oregon, and cause the same to be bound and properly identified in the customary manner, boxed, wrapped and shipped to ———, or other trustees selected by the Title Insurance & Investment Company of Tacoma and the Traders Trust Company of Oregon, or their successors or assigns according to the terms of a certain agreement of pledge dated December 2nd, 1911, PROVIDED, HOWEVER, it shall be agreed in connection with such guaranty that the Traders Trust Company of Oregon shall waive the right to demand such take-offs so long as each and every one of the payments of the principal and interest upon said notes and each of them is made at the times specified in said notes, and each of them, and so long as each and every of the covenants on the part of the Title Insurance & Investment Company of Tacoma in its agreement of pledge of said date is kept and performed at the times therein agreed, and for a period of one year thereafter. In the event of such default, and its continuance for one year, however, the Commonwealth Title Trust Company will agree that it will forthwith furnish or cause to be furnished to the Traders

Trust Company of Oregon, its successors and assigns, all the take-offs necessary to complete said plant in the manner hereinbefore specified and thereafter so long as said plant or any part of it is held as security for such indebtedness this company will keep said plant down to date in such manner.

"I, Franklin Fogg, secretary of the Commonwealth Title Trust Company, do hereby certify that the foregoing is a true copy of a resolution duly passed by the stockholders and trustees of the Commonwealth Title Trust Company at a meeting duly called and held, all the trustees and all the stockholders being present, said resolution receiving a unanimous vote.

"WITNESS MY HAND and seal of said company this 2nd day of December, 1911.

"Franklin Fogg,

(Corporate seal)

Secretary."

VIII.

The payments of interest provided for in the several agreements set forth in the plaintiff's bill and marked Exhibits "A," "B" and "C," accruing June 7th, 1912; December 7th, 1912; June 7th, 1913; December 7th, 1913, and June 7th, 1914, each in the sum of \$2000.00, were paid substantially at the time agreed upon, each and every of said payments being made by check of the Commonwealth Title Trust Company, to the Lumbermen's Trust Company, plaintiff in this suit.

With reference to the payment of interest due June 7th, 1913, the following correspondence was had:

“COMMONWEALTH TITLE TRUST
COMPANY,

Tacoma, Washington, June 5th, 1913.

Traders Trust Company of Oregon,

Portland, Oregon.

Gentlemen:

On June 7th, there will be due you from the Commonwealth Title Trust Company, two thousand dollars interest on certain payments guaranteed by this company. On account of the poor condition of the abstract business, we are now unable to make this payment, but expect to be able to take care of all or most of it within the next sixty or ninety days.

In order to straighten up the finances of the company, we have cut the salaries of the three highest right in two, and have also arranged to lay each employee off for one month during the next four months. On December first we will be free of the Wilson lease, so all of these cuts in expenses will enable us to catch up with our payments once more. I am very sorry to have any delay in this payment, but the total abstract business gradually drops down until it's a struggle to pay running expenses, but we have the situation well in hand now and will forward payments as soon as possible.

Yours very truly,

Commonwealth Title Trust Company,

(Signed) Horace Fogg, President.”

“COMMONWEALTH TITLE TRUST
COMPANY,

Tacoma, Washington, August 1st, 1913.

Mr. A. D. Willoughby,

Portland, Oregon.

Dear Willoughby:

If you will be here on the 7th or 8th of this month

I will have at least a thousand dollars for you, and want to talk over another matter with you at the same time. We lost our tax case but have not yet decided about the appeal.

As to these assessments, Champlain reports with another one against the unplatted piece adjoining the lots.

Yours very truly,

(Signed) Horace Fogg."

IX.

With reference to the payment of interest of December 7th, 1914, and subsequent instalments of interest or principal, the following correspondence was had:

(1) From Lumbermen's Trust Co. to Commonwealth Title Trust Company:

"Portland, Nov. 30, 1914.

Gentlemen:

On December 7th interest to the amount of \$2000 will be due on the \$80,000 of notes of the Title Insurance & Investment Company, which we hold in escrow. Your prompt attention to the matter will be appreciated.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(2) From Lumbermen's Trust Co. to Commonwealth Title Trust Company:

"Dec. 9, 1914.

Gentlemen:

The \$2000 interest due on the \$80,000 notes of the Title Insurance & Investment Company payable December 7th, has not been received by us. Kindly advise when we may expect it.

Yours truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(3) From Commonwealth Title Trust Co. to Lumbermen's Trust Company:

"December 10th, 1914.

Gentlemen:

We are this morning in receipt of your letter relative to interest, etc., and thank you for same. We have been expecting to write you for several days, but were waiting to see how matters were coming out with us.

We are unable to send you the money at the present time, but hope to send you \$1000 on or about January 1st, and the balance a little later. We are sorry that we cannot meet this promptly, but conditions will not permit.

Thanking you for your courtesy, we are,

Yours truly,

Commonwealth Title Trust Company,

By Franklin Fogg, Manager."

(4) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"Dec. 12, 1914,

Gentlemen:

We are in receipt of yours of the 10th relative to your being unable to meet the interest which was due December 7th. We have so notified the parties concerned.

Yours very truly,

W. S. Hallenbeck,
Asst. Sec'y."

(5) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"Jan 7th, 1915.

Gentlemen:

Referring to yours of December 10th. We have not yet received a remittance from you in connection

with the escrow which we hold. When may we expect it? We are receiving inquiries every day or so.

Yours very truly,

Lumbermen's Trust Company,

W. A. Hallenbeck,

Asst. Sec'y."

(6) From Commonwealth Title Trust Co. to Lumbermen's Trust Co.:

"Jan. 11th, 1915.

Gentlemen:

Regarding your Traders Trust Company escrow, we hoped to be able to pay part of the interest by the 10th of this month, but business has been so quiet that we are unable to do so, and we are turning most of our outstanding accounts over to a collection agency in the hopes of getting in enough money to clean up the payment within the next thirty to sixty days.

Yours very truly,

(Signed) Horace Fogg,
President."

(7) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"Jan. 12th, 1915.

Gentlemen:

We beg to acknowledge receipt of your letter of the 11th, and have notified the parties concerned regarding your inability to pay the interest due on the 10th until thirty to sixty days later. Yours truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(8) From Lumbermen's Trust Co. to Commonwealth Title Trust Co., by registered letter, receipt of which is acknowledged:

"March 2nd, 1915.

Gentlemen:

Referring to our notice of November 30th, 1914, that on December 7th, 1914, interest to the amount of \$2000 would be due on the \$80,000 of notes of the Title Insurance & Investment Company, which we hold in escrow.

Up to the present time we have received no funds from you in payment for this interest. We would therefore call your attention to the fact that according to the terms under which these notes are held by us in escrow, the interest will be in default on March 7th, i. e., ninety days from December 7th, 1914.

Kindly advise us if the interest will be forthcoming before March 7th.

Yours very truly,

W. H. Hallenbeck,
Asst. Sec'y."

(9) From Lumbermen's Trust Co. to the Title Insurance & Investment Company, by registered letter, receipt of which is acknowledged by the Commonwealth Title Trust Co. (See Item 10):

"March 9th, 1915.

Gentlemen:

Herewith please find copy of our letter to the Commonwealth Title Trust Company, also copy of our letter to the beneficiaries referred to therein, relative to the interest which is in default on the \$80,000 of notes of your company.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(10) From Lumbermen's Trust Company to Commonwealth Title Trust Company, by registered letter, receipt of which is acknowledged:

"March 9th, 1915.

Gentlemen:

This is to formally advise you, that the interest amounting to \$2000, due December 7th, 1914, on the \$80,000 notes of the Title Insurance & Investment Company, which we hold in escrow, is now in default, the ninety days of grace having expired.

We beg to inform you that we expect to ask the beneficiaries to take the legal steps to which they are entitled, in order to protect their interest.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(11) From Lumbermen's Trust Co. to Commonwealth Title Trust Company:

"March 22nd, 1915.

Gentlemen:

We have had no advices from you as to the interest which is in default on the \$80,000 of notes of the Title Insurance & Investment Company, about which we wrote you on March 9th.

We will be pleased to hear from you as to what your prospects are of a settlement, other than through legal means.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(12) From Lumbermen's Trust Co. to Title Insurance & Investment Company (See Item 13) :

"May 19th, 1915.

Gentlemen:

We are sending you herewith for your information, a copy of a letter which we have today addressed to the Commonwealth Title Trust Company of Tacoma, Wn., with reference to the semi-annual interest due on June 7th, on the \$80,000 of notes of your company, which we hold in escrow.

Yours very truly,

W. H. Hallenbeck,
Asst. Sec'y."

(13) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"May 19th, 1915.

Gentlemen:

On June 7th the semi-annual interest to the amount of \$2000 will be due on the \$80,000 of notes of the Title Insurance & Investment Company, which we hold in escrow.

Your prompt attention to this matter will be appreciated.

We would also call your attention to the fact that thus far no remittance has been received by us to cover a like amount of interest due on the last semi-annual interest date, which is December 7th, 1914.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(14) From Lumbermen's Trust Co. to Title Insurance & Investment Co. (See Item 15):

"June 8th, 1915.

Gentlemen:

Please find enclosed copy of a letter which we are today addressing to the Commonwealth Title Trust Company, relative to the unpaid interest due December 7th, 1914, on the \$80,000 of your notes which we hold in escrow, and in connection with the payment due on June 7th.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(15) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"June 8th, 1915.

Gentlemen:

Referring to our notice of May 19th, to the effect that on June 7th interest to the amount of \$2000 would be due on the \$80,000 of notes of the Title Insurance & Investment Company which we hold in escrow.

Up to this writing no funds have been received.

In our letter we also called attention to the fact that thus far no remittance has been received by us to cover a like amount due on the last semi-annual interest date, namely, December 7th, 1914.

We would appreciate an early reply from you as to the present status of this matter.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(16) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"June 24th, 1915.

Gentlemen:

Will you kindly advise us by return mail the status of the interest payments due on December 7th, 1914, and June 7th, 1915, about which we wrote you on June 8th.

As this matter is held by us in escrow we are at least entitled to the courtesy of a reply.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(17) From Lumbermen's Trust Co. to Title Insurance & Investment Co. (See Item 18):

"November 9th, 1915.

Gentlemen:

We are sending you herewith for your information, a copy of a letter which we have today addressed to the Commonwealth Title Trust Company of Tacoma, Wash., with reference to the semi-annual interest due on December 7th, on the \$80,000 of notes of your company which we hold in escrow.

Yours very truly,

(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(18) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

"November 9th, 1915.

Gentlemen:

On December 7th the semi-annual interest to the amount of \$2000 will be due on the \$80,000 of notes

of the Title Insurance & Investment Company, which we hold in escrow. Your prompt attention to this matter will be appreciated.

We would also call your attention to the fact that thus far no remittance has been received by us to cover a like amount of interest due on the last two semi-annual interest dates, which were June 7th, 1915, and December 7th, 1914.

Yours very truly,
(Signed) W. H. Hallenbeck,
Asst. Sec'y."

(19) From Lumbermen's Trust Co. to Title Insurance & Investment Co.:

Gentlemen: "November 24th, 1915.

The first note issued by you to the Traders Trust Company, of Portland, Ore., and one of a series of thirty-two notes, will be due and payable on December 7th, 1915.

As trustee of these notes for the Traders Trust Co. we ask that payment be made directly to us.

Yours very truly,
(Signed) W. H. Hallenbeck,
Trust Department."

(20) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

Gentlemen: "November 24, 1915.

We enclose herewith copy of letter to the Title Insurance & Investment Company of Tacoma, with reference to the payment of their note, due December 7th, 1915. Inasmuch as you are guarantor of the first seven notes, of the issue of which this is one, we feel that you should be notified of the maturity thereof.

Yours very truly,
W. H. Hallenbeck,
Asst. Sec'y."

(21) From Lumbermen's Trust Co. to Title Insurance & Investment Co.:

Gentlemen: "December 8th, 1915.

We regret to state that no remittance has been received from you to take up your note in favor of the Traders Trust Company of Portland, which was due on December 7th, 1915. We have sent this information to the beneficiaries of the trust, and shall follow their requests for placing this matter on a more satisfactory basis. Yours very truly,

W. H. Hallenbeck,
Trust Department."

(22) From Lumbermen's Trust Co. to Commonwealth Title Trust Co.:

Gentlemen: "December 8th, 1915.

We regret to state that the semi-annual interest to the amount of \$2000 and the \$2500 for the payment of the note due from the Title Insurance & Investment Company of Tacoma, on December 7th, 1915, have not been received.

We have given information of this default to the beneficiaries of the trust, and await their requests for placing the matter on a more satisfactory basis.

Yours very truly,

(Signed) W. H. Hallenbeck,
Trust Department."

ROBERT M. DAVIS,
FRANK H. KELLEY,
JOHN H. HALL,
Counsel for Plaintiff.

BATES, PEER & PETERSON,
Counsel for all the Defendants.

Exhibit "A."

THIS AGREEMENT, made and executed in duplicate this 6th day of December, A. D. 1909, by and between Wilson Title & Abstract Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, the party of the first part, hereinafter referred to as "said company," and Franklin Fogg and A. D. Willoughby, their legal representatives and assigns, parties of the second part, hereinafter referred to as "second parties." **WITNESSETH:**

Paragraph 1. For and in consideration of the covenants and agreements hereinafter set forth to be kept and performed by second parties, said company hereby leases to said parties of the second part, their legal representatives and assigns, the entire abstract plant, books, records, files, and property of said company now situated in the county court house at Tacoma, Pierce County, Washington, more fully but not exclusively, described in the schedule annexed hereto marked Schedule A, and made a part hereof, together with all additions, improvements and increase thereof hereinafter provided for, for the period of five years from the date hereof, at the monthly rental of three hundred and sixteen dollars and sixty-five cents (\$316.65), in addition to the expense of maintaining said plant as hereinafter provided, payable on or before the 6th day of each and every month during said period, at the Fidelity Trust Company Bank, at Tacoma, Washington, which said rental of \$316.65 per month and said expense of maintainance said second parties agree to pay according

to the terms of this agreement, and each and all of said sums of \$316.65 remaining unpaid after the same shall have become payable as herein provided shall bear interest at the rate of ten per cent per annum; **PROVIDED**, that if said second parties shall exercise the option herein granted and shall purchase said plant within the time provided therefore and shall pay and discharge all the monthly payments due and payable up to the time of such purchase, then from the time of such purchase said second parties shall not longer be required to pay said monthly sum of \$316.65, but from said time of buying shall pay the purchase price and the instalments thereof, all as hereinafter set forth and provided, together with the cost and expense of keeping up and maintaining said plant as herein provided.

Paragraph 2. For the same consideration said company hereby grants unto said second parties, their legal representatives and assigns, the right and option to buy from said company at any time prior to the 6th day of December, A. D. 1911 (one thousand nine hundred and eleven), the said entire abstract plant, books, records and files, including the additions, improvements and increase, hereinafter provided for, at and for the price of thirty-eight thousand (\$38,000) dollars, payable as follows:

\$5000 in cash at the time of exercising said option and purchasing said plant (which time is hereinafter referred to as "the time of buying");

\$5000 on or before one year after said time of buying;

\$5000 on or before two years after said time of buying;

\$5000 on or before three years after said time of buying;

\$5000 on or before four years after said time of buying;

\$5000 on or before five years after said time of buying;

\$5000 on or before six years after said time of buying; and

\$5000 on or before seven years after said time of buying; all deferred payments to bear interest from said time of buying until paid, at the rate of six per cent per annum, payable quarterly, all of said sums both of principal and interest to be paid at the Fidelity Trust Company Bank at the City of Tacoma, said deferred payments and each and all of them and every part of the unpaid purchase price of said plant to be secured by mortgage of said entire plant, books, records and files, including the additions, improvements, and increase hereinafter provided for, and also to be further secured by additional high-class collateral or other security to the amount of fifteen thousand dollars, satisfactory to said company, said mortgage to contain, besides the usual provisions of chattel mortgages, the provision (a) that in case of failure to pay any portion of the principal or interest when the same shall become due and payable, or in case of the failure on the part of second parties to keep and perform any of the covenants or agreements herein set forth to be by them kept and performed, then the whole of the principal sum shall immediately become due and payable at the option of said company; (b) that in case any action or proceeding be had or commenced for the foreclosure of said mort-

gage a reasonable attorney fee shall be included in the judgment or added to the amount due or payable under the terms of said mortgage, and (c) the provisions, stipulations, and conditions of this agreement so far as the same relate to said option and sale and the keeping up and maintainance of said abstract plant.

Paragraph 3. It is further agreed that for and during said period of five years from the day of the execution hereof, or in case said second parties shall exercise said option and purchase said plant prior to said 6th day of December, A. D. 1911, then from the date of this agreement up to the time of buying, and from the time of buying up to the time when the last and final payment, and complete payment, of the full amount of said purchase price with the interest thereon, shall have been made according to the terms of this agreement, said plant shall be kept up and maintained at the cost and expense of said second parties, as follows:

(a) The current files in the office of the county auditor, county clerk, etc., shall be "taken off" in the manner in which such files have been heretofore taken off by said company, or as taken off by the Commonwealth Title Trust Company, the files in the county auditor's office to be taken off daily.

(b) The take-off slips or sheets shall be posted and checked in the property indexes and the alphabetical indexes of said plant immediately or within a reasonable time after the same shall have been taken off, and such posting and checking shall be done in the manner heretofore followed by said company in keeping up and maintaining said plant.

(c) Such files shall be taken off and such posting and checking shall be done by a person or persons necessary to perform such work, satisfactory to and selected by said company, and such person or persons shall be of the same general quality, ability and experience, as far as practicable, as the persons heretofore and now employed by said company in such work, and shall be paid salaries no lower and no greater than the salaries now paid by said company, unless by consent of all parties hereto.

(d) Unless the persons employed in so taking off and posting shall include a man, then a man or boy satisfactory to said company, shall be employed especially to take the books out of the vault in the mornings and return the same to the vault in the evenings.

(e) Said company shall control the work of taking off and posting and checking during said period of five years, or in case second parties shall exercise said option to purchase, then down to the time of exercising said option to buy, if the same be exercised, but no officer, trustee or stockholder of said company shall be required to give such work his time or more than a general supervision, and shall receive no compensation from said second parties therefor, but nothing in this subdivision shall be construed to affect the provision that during the entire life of this contract said plant shall be kept and maintained as in said paragraph 3 and all subdivisions thereof; provided, said company and its officers shall have the right to examine and inspect all and every part of said plant, and the additions, improvements, and increase, at all times during the life of this lease, and

until said purchase price shall have been fully paid, in case said option to buy shall be exercised.

(f) A suitable room (or rooms) shall be procured and maintained with sufficient heat and light and with a satisfactory vault for the protection of the books, all to be selected by or to be satisfactory to said company, but at a cost not to exceed \$150 per month. It is understood that the plant shall remain in its present quarters, or similar quarters, at the county court house, under the present arrangement therefor, or a similar arrangement, as long as possible or practicable.

(g) Said plant shall be insured by said company, at said second parties expense, against loss by fire, in the sum of at least \$10,000, or so much thereof as can be obtained with reasonable effort, with loss if any payable to said company as its interest may appear, and said insurance shall be maintained continuously during the whole term of this contract.

(h) Down to the time of exercising said option, said company is hereby authorized by second parties to employ all necessary help, rent quarters, procure necessary fir fixtures, and remove the plant when necessary, to negotiate insurance, and to incur such expense for stationery and other matters in connection with the keeping up and maintainance of said plant, all as provided in said paragraph 3.

(i) Said second parties shall pay the salaries of the persons employed in the work above mentioned, and also the rent of the room and vault above mentioned, and such payment shall be made monthly on or before the 12th day of each calendar month. Said second par-

ties shall also pay all taxes assessed against said plant, or against any person, firm or corporation, on account of said plant, and such payment of taxes shall become due and payable, provided that said company shall pay the taxes for the year 1909, being due and payable in February, 1910, and second parties, upon the termination of this agreement shall pay or secure to be paid all of the taxes on said plant for the year in which the contract shall so terminate (as well as all prior taxes) whether said taxes for said year shall be then due or payable or not; said second parties shall also pay all premiums upon insurance obtained upon said plant, and all cost and expense of removing said plant and of fitting up new quarters, as aforesaid, if such removal be necessary or desirable, and all the cost of paper, binders, blanks and other stationery and supplies as may be necessary to be procured in keeping up and maintaining said plant in the same manner as heretofore.

(j) If second parties shall fail to make payment for help, rent, taxes, insurance premiums or other expenses mentioned in this paragraph when the same shall be due and payable, then said company may pay such expenses and the amount or amounts thereof shall be due and payable forthwith from said second parties to said company and shall be secured as other amounts or payments or installments of purchase price payable under this contract are secured, and the failure of said second parties to pay any amount due for help, rent, taxes, insurance premiums or other expenses shall have the same effect as a default in the payment of any other sum, amount, or installment payable under the pro-

visions of this agreement, provided that no default be claimed on account of the failure to pay any of the expenses mentioned in this paragraph 3 until five days after a bill or statement of such expenses shall have been presented to Franklin Fogg or A. D. Willoughby, or left for them at 109 South Tenth street, at Tacoma, Wash., or at Fidelity Trust Company Bank in said city.

Paragraph 4. It is agreed by the parties hereto that said company shall remain in the exclusive possession of said abstract plant for the purpose of taking care of the same and of keeping up and maintaining the books, files, indexes, records, and other documents thereof as provided in paragraph 3, down to the time when said second parties shall exercise the option to purchase said plant given above, in case they do exercise the same, said second parties shall have the right to examine and inspect all and every part of said plant, and the additions, improvements, and increase, at all times. After exercising their said option to purchase, said second parties shall be entitled to the possession of said plant, including the additions, improvements and increase.

Paragraph 5. Said abstract plant is intended to include the good will of said company, and said company, and its officers, agree not to start or be interested in any other abstract plant in or of the records of Pierce County, Washington, or of any part of such records, during the life of this lease, nor until the above plant is paid for in case said second parties exercise their option to purchase.

Paragraph 6. Time is the essence of this agreement.

Paragraph 7. Nothing herein contained shall be construed so as to extend the time of payment of the sum or of any of the sums to be paid under this agreement beyond the time expressly reserved by said company at its option to declare this contract null and void upon failure of said second parties to pay at the time herein fixed for such payment any sum or amount herein provided to be paid by said second parties, or upon the failure of said second parties to fully comply with any of the terms and conditions hereof.

Paragraph 8. Said company represents that it is the owner of said plant and that the same is unencumbered, and shall remain unencumbered during the life of this lease, but said company makes no representations as to the character, quality, accuracy or completeness thereof.

This entire agreement shall extend to and be binding upon said company, its successors and assigns, and to said second parties, their legal representatives and assigns.

IN WITNESS WHEREOF, we have subscribed this agreement the day and year first above written.

Wilson Title and Abstract Company,

(Seal)

By R. C. Wilson, President.

Franklin Fogg.

A. D. Willoughby.

Assignment.

In consideration of the sum of one dollar and other good and valuable considerations, I hereby sell, assign, and transfer to Franklin Fogg all my interest in that certain lease and option to buy the abstract plant and property of Wilson Title & Abstract Company, dated December 6th, 1909, this day entered into between said Wilson Title & Abstract Company as party of the first part, and said Franklin Fogg and A. D. Willoughby as parties of the second part, this assignment to be subject to all of the terms and conditions of said lease and option.

Dated at Tacoma, December 6th, 1909.

A. D. Willoughby.

In consideration of the foregoing assignment, I hereby agree to indemnify and hold harmless the said A. D. Willoughby from any loss or liability under or by virtue of said lease and option.

.....

Exhibit "B."

Bill of Sale.

KNOW ALL MEN BY THESE PRESENTS, that Commonwealth Title Trust Company, a corporation organized and existing under the laws of the State of Washington, party of the first part, in consideration of the sum of one (\$1.00) dollar and other good and valuable considerations, to it in hand paid by the Title Insurance & Investment Co., of Tacoma, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns the following goods, chattels and property, to-wit: A set of current files embracing a number of volumes properly numbered and identified with the proper fee numbers thereon, and containing an abstracted copy of all deeds, mortgages, or other conveyances, mechanics' liens, leases, and all miscellaneous records affecting the title to real property in Pierce County, or filed for record in the office of the county auditor of Pierce County up to June 1st, 1909, said records containing information full and complete enough to enable any abstract company to compile an abstract as full and complete as the abstracts made and put out heretofore by the Title Insurance & Investment Company of Washington.

TO HAVE AND TO HOLD the same to the party of the second part, its successors and assigns forever. And it does for itself and its successors and assigns agree to and with the said party of the second

part, its successors and assigns, to warrant and defend the sale of said property, goods and chattels hereby made unto said party of the second part, its successors and assigns against all other persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said party of the first part has hereunto set its hand and corporate seal this 7th day of December, A. D. 1909.

Commonwealth Title Trust Company,

By H. H. Gove, President.

Attest: Horace Fogg, Secretary.

The Commonwealth Title Trust Company

Corporate Seal

1902

Tacoma, Washington.

Exhibit "C."

Memorandum of Agreement.

MEMORANDUM OF AGREEMENT, made and entered into this 7th day of December, A. D. 1909, between Title Insurance & Investment Company of Washington, the party of the first part, the Title Insurance & Investment Co., of Tacoma, as party of the second part, and Commonwealth Title Trust Company, as party of the third part.

WITNESSETH: That whereas said Commonwealth Title Trust Company is the owner and possessor of an abstract plant at Tacoma, Washington, and said Title Insurance & Investment Co., of Tacoma, is the owner and possessor of a similar abstract plant at Ta-

coma, and whereas said Title Insurance & Investment Company of Washington is the owner and holder of a mortgage for \$80,000, on the plant and property of said The Title Insurance & Investment Co. of Tacoma, and whereas said abstract plants, or some part thereof, may become lost, damaged, or destroyed by fire, theft, negligence or other cause,

NOW THEREFORE, for the mutual protection of said plants, and in consideration of the mutual agreements of the parties hereto, it is hereby mutually agreed that in the event that any of the abstract records of any of the parties hereto shall be lost, damaged or destroyed by fire or any other cause, or any part of said records, then the other company shall and will permit the use of its records, without expense, for the purpose of re-writing or restoring the records so lost, damaged, or destroyed. **PROVIDED**, that the same shall be used in the office of the company owning the same and under supervision and such reasonable regulations as may be imposed by such company so owning the same, so that its own use thereof in its business shall not be interfered with, or the safety of its said records jeopardized.

It is further agreed that in the event that any of the abstract records of said the Title Insurance & Investment Co., of Tacoma, shall be lost, damaged or destroyed, and said company shall fail or neglect to rewrite or restore its said records and make use of the privilege and rights above granted, then said Title Insurance & Investment Company of Washington shall have the right, as mortgagee, to rewrite or restore the same, at the expense of said mortgagor, and shall have

the rights and privileges hereinabove granted of making use of the records of said Commonwealth Title Trust Company for that purpose.

This agreement shall remain in full force and effect during the life of said mortgage, dated December 7th, 1909, given by said The Title Insurance & Investment Co. of Tacoma to said Title Insurance & Investment company of Washington, on its said abstract plant at Tacoma.

IN WITNESS WHEREOF, said parties have caused their corporate names to be subscribed hereto, in triplicate, the day and year first above written.

Title Insurance & Investment Company of Washington,

(Seal)

By C. B. Othick, Vice President.

Attest: A. D. Willoughby, Secretary.

The Title Insurance & Investment Co. of Tacoma,

(Seal)

By A. D. Willoughby, President.

Attest: A. F. Albertson, Secretary.

Commonwealth Title Trust Company,

(Seal)

By Edward Fogg, Vice President.

Attest: Franklin Fogg, Secretary.

(Here follows a long inventory which is not material to any question on appeal except the following:)

A set of current files embracing a number of volumes properly numbered and identified with the proper fee numbers thereon, and containing an abstracted copy of all deeds, mortgages, or other conveyances, mechanics' liens, leases, and all miscellaneous records affecting the

title to real property in Pierce County, or filed for record in the office of the county auditor of Pierce County, up to June 1st, 1909, said records containing information full and complete enough to enable any abstract company to compile an abstract as full and complete as the abstracts made and put out heretofore by the Title Insurance and Investment Company of Washington.

TESTIMONY AT TRIAL.

On June 16th, 1916, the cause came on regularly to be heard before E. E. Cushman, District Judge, the plaintiff being represented by Frank H. Kelley, John H. Hall and Robert M. Davis, Esqs., the defendant being represented by Bates, Peer & Peterson, Esqs.

The defendant objected to the introduction of any testimony on the ground that the complaint failed to state facts sufficient to constitute a cause in equity against the defendants, or any of them, or to entitle the plaintiff to any relief against the defendants, or any of them. The objection was overruled for the time being, the Court stating that the matter could be considered in final argument.

Whereupon the plaintiff by competent testimony, over the objections of the defendants, proved that the cost of procuring the "take-off" of current records, down to the time of the trial of this action, in compliance with the terms of the agreement marked "Exhibit B," attached to the complaint, was twenty thousand dollars, and that defendants offered no testimony on this subject.

The parties to this suit therefore hereby stipulate and agree that in the event by the final determination of this action it shall be decreed that appellant is entitled to said "take-off," the Commonwealth Company shall have the option of turning over said "take-off" down to the time of the trial of this action, within sixty days after the entry of said final decree, or paying to the appellant the sum of twenty thousand dollars, in lieu thereof.

A. D. Willoughby, a witness called by the plaintiff, being sworn, testified in direct examination, that he was the individual referred to in the pleadings and contracts in the suit; that in 1911 he was president of the Traders Trust Company, an Oregon corporation organized to operate properties belonging to witness and Mr. and Mrs. O. M. Smith, which company then owned certain notes and a mortgage to secure the same made by the Title Insurance & Investment Company of Tacoma to the Title Insurance & Investment Company of Washington; that in 1911 resulting from dealings had by the witness with the several defendants Fogg and Gove, the contracts set forth in the complaint and attached thereto as Exhibits "A," "B" and "C," were entered into: that pursuant to these agreements the notes of the Title Insurance & Investment Company of Tacoma, then held by the Traders Trust Company, were surrendered and the mortgage to secure these notes were satisfied of record; that for the surrender of these notes and the satisfaction of the mortgage the Traders Trust Company received the contracts referred to as Exhibits "A," "B" and "C" and notes of the Title

Insurance & Investment Company of Tacoma (these notes, marked Plaintiff's Exhibit 1, shown to the witness and by him identified, were then admitted in evidence; the original agreement of the Commonwealth Title Trust Company was then shown to the witness and by him identified, and was offered in evidence and admitted as Plaintiff's Exhibit 2).

O. M. Smith, a witness called by the plaintiff, being sworn, testified on direct examination; that he was the individual mentioned in the contracts and pleadings; that he had been continually in the abstract business from 1886 until 1912, and in Pierce County from 1905 to 1910, and was familiar with the work necessary to abstract records. The business of abstracting consists of showing such instruments of record affecting the title to real property with sufficient particularity to enable one to determine the character of a given title without referring to anything outside of the abstracts. The abstract is prepared from public records only from which the abstractor has obtained the information for the customer; such abstracts are prepared upon special order to cover a given tract of land but abstractors customarily keep in stock certain sheets which are combined with other sheets to make the abstract; the abstract given to the customer is simply a copy of the information relating to a given title. The first thing that a company has to do in order to render that service in the conduct of its business, is to have a tract index showing all of the instruments affecting any particular piece of property in a county. Second: To have a name index. It should show everything that may in any

way affect real property that does not contain a description of land, such as judgments, personal judgment, attachments, etc. Everything you would want to complete a chain of title. It has been our custom to prepare abstracts of record of that kind in this county. The sources from which we obtain our information are from the public records, city hall, court house and United States Court. A customer comes to our office for an abstract, or for a continuation; we make it up for him, and make him a price, and he pays us for it. Abstracts are prepared under special order, but at the same time we usually keep what is called stock, like taking a certain section where there are several additions, we will make up stock covering all of these additions in that section. The information which is contained in a given abstract still remains as part of our records in the office. We have a copy in some form of everything we send out.

Franklin Fogg, one of the individual defendants, a witness called by the plaintiff, being sworn, testified that he was a stockholder and officer of the defendant Commonwealth Title Trust Company and manager of its business; in 1911 witness was a stockholder of the Title Insurance & Investment Company of Tacoma, but did not know who were its officers; in 1911 the officers of the Commonwealth Title Trust Company were Horace Fogg, president; Fred S. Fogg, Edward Fogg and H. H. Gove, vice president; Franklin Fogg, secretary and treasurer; all of these officers constituted the trustees.

On cross examination the witness testified that he might have been mistaken as to H. H. Gove being an officer in December, 1911; that Gove resigned in 1909, but the witness' recollection was that he was re-elected vice president after 1911.

On redirect examination the witness testified that H. H. Gove was not an officer of the Commonwealth Title Trust Company on or prior to December 2nd, 1911, but was a stockholder of the company; the four Fogg boys were the trustees of the company at that time.

H. H. Gove, one of the individual defendants, called as a witness by the plaintiff, being sworn testified that prior to December 7th, 1909, he was a stockholder, trustee and president of Commonwealth Title Trust Company on which date he resigned as president and trustee but continued a stockholder having the same stock interest; that about the middle of December, 1911, he was re-elected a trustee and became a vice president of the company; that he became a stockholder, trustee and vice president of the Title Insurance & Investment Company of Tacoma in December, 1909, the other officers being A. D. Willoughby, president, with the witness, Willoughby, Mr. Albertson and Mr. Rice as trustees; that in December, 1909, the stock held by Willoughby, Albertson and Rice was surrendered and re-issued to Horace Fogg, Franklin Fogg, Edward Fogg, Herbert H. Gove, Fred S. Fogg and D. I. Fogg, and that from and after December 30th, 1909, neither Willoughby, Albertson or Rice had any interest in or connection with the company; the company was organized about De-

ember 1st, 1909; Fred Fogg and Franklin Fogg had the matter in charge; its purpose was to take the title and to execute the mortgage to secure the purchase of certain property from the Title Insurance & Investment Company of Washington; its articles called for five trustees, but from and after January 1st, 1910, witness and Fred S. Fogg were its sole trustees and conducted its business without any other trustees or officers; the management was substantially in witness's hands and was carried on in the interest of the stockholders of the Commonwealth Title Trust Company and the stockholders of the Title Insurance & Investment Company of Tacoma, who were substantially identical.

Horace Fogg, one of the individual defendants, a witness called by the plaintiff, being sworn testified that prior to December 7th, 1909, he was a stockholder and officer of defendant Commonwealth Title Trust Company, and was one of the parties interested in the organization of the Title Insurance & Investment Company of Tacoma, which company was organized in the interests of the stockholders of the Commonwealth Title Trust Company for the purpose of taking title to the property purchased from the Title Insurance & Investment Company of Washington and giving a mortgage back to secure part of the purchase price, and also to operate the property after its purchase. The property was operated by defendant Gove in the interests of its stockholders who were substantially identical with the stockholders of the Commonwealth Title Trust Company.

On cross examination the witness testified that the purpose of the organization of the Title Insurance & Investment Company of Tacoma was to suppress the competition of the Title Insurance & Investment Company of Washington.

On redirect examination the witness testified that the two companies had practically all of the abstract business at that time and having the Title Insurance & Investment Company's plant in friendly hands practically suppressed all competition. The attention of the witness being called to the clause of the 1909 mortgage (Defendants' Exhibit A, attached to the answer of defendant Commonwealth Title Trust Company) providing that the mortgagor should operate the plant and use its best endeavor to enlarge and build up the business during the life of the mortgage, the witness testified that the clause was carried out in good faith, and that by suppressing competition he meant doing away with cutting rates which had been theretofore practiced; that no attempt was made or any intention existed to raise prices. The only purpose being to do away with price cutting. Just prior to the formation of this new company, and Mr. Gove taking charge of it, the rates were being cut from 25 to 50 per cent. After Mr. Gove took charge the rates were held up to the old-time rates of one dollar. There was no attempt made or purpose to increase this price. It would have been possible for us, or any person engaged in the abstract business, to raise prices so that they would be exorbitant; if both companies controlled practically all of the business the public would have to pay the price

demand, up until the time some other concern would come in; that the abstract business was open to all, but required a plant which required time to produce; that an abstract made from the public records would not be accepted in the ordinary course of business.

The witness' attention was called to Section 8795, Remington's & Ballinger's Code of Washington, as follows:

“DUTIES OF AUDITOR AS CUSTODIAN. The county auditor, in his capacity of recorder of deeds, is sole custodian of all books in which are recorded deeds, mortgages, judgments, liens, encumbrances, and other instruments of writing, indexes thereto, maps, charts, town plats, survey, and other books and papers constituting the records and files in said office of recorder of deeds; and all such records and files are and shall be matters of public information, free of charge to any and all persons demanding to inspect or to examine the same, or to search the same for titles of property. It is said recorder's duty to arrange in suitable places the indexes of said books of record, and when practicable, the record books themselves, to the end that the same may be accessible to the public, and convenient for said public inspection, examination and search, and not interfere with the said auditor's personal control and responsibility for the same, or prevent him from promptly furnishing the said records and files of his said office to persons demanding any information from the same. The said auditor or recorder must and shall, upon demand and without charge, freely permit any and all persons, during reasonable office hours, to inspect, examine and search any or all of the records and files of his said office, and to gather any information therefrom, and to make any desired notes or mem-

oranda about or concerning the same, and to prepare an abstract or abstracts of title to any and all property therein contained."

The witness testified that he was familiar with that law. Any one could examine the records, but would not know whether he had all of the instruments that the county auditor had or not. There are no indexes by which he could know whether the recorded instruments affected a given title.

The witness' attention was called to Section 8792, Remington & Ballinger's Code, reading as follows:

"TO SEARCH RECORDS AND FURNISH CERTIFICATE, WHEN.—The auditor must, upon the application of any person, and upon the payment or tender of the fees therefor, make searches for conveyance, mortgages, and all other instruments, papers, or notices recorded or filed in his office, and furnish a certificate thereof, stating the names of the parties to such instruments, papers, and notices, the dates thereof, the year, month, day, hour and minute they were recorded or filed, the extent to which they purport to affect the property to which they relate, and the book and pages where they are recorded"—and providing further that for neglect or refusal so to do, or for defects therein in any important particular, the auditor is liable to the party aggrieved for damages sustained thereby.

The witness testified that he was not familiar with that provision of the law; that the auditor did not follow that law out, because several times a month the county auditor gets letters from people living in other places sending here to him to make abstracts, and he turns them over to one of the abstract companies, without even notifying the party making the applica-

tion; he sends it down to us, and tells us to make an abstract and forward it to the people ordering it, and we do it for him. The county auditor made abstracts here in the early days, but not since 1890.

On re-cross examination the witness testified that he had been in the abstract business for 15 years; that the usual custom was that an abstract would be ordered from an abstract company organized for that purpose which had been an established business; that it is not possible for the county auditor to make abstracts; that witness never had heard of an abstract made by the auditor; that the Commonwealth Title Trust Company had made about 45,000 abstracts during time witness had been in business.

Thereupon counsel for plaintiff offered in evidence the stipulation as to facts (on Record p. 75) and the same was admitted and marked Plaintiff's Exhibit 3.

Thereupon plaintiff rested its case in chief.

DEFENSE.

Thereupon the defendants offered the following:

Fred S. Fogg, one of the individual defendants, being called by the defense and sworn, testified that he was a stockholder, trustee and officer of defendant Commonwealth Title Trust Company and identified a copy of the articles of incorporation of that company, which was offered and received in evidence and marked Defendants' Exhibit A; that he has been a stockholder, officer, trustee and attorney for the Commonwealth Company since its organization in 1901 or 1902, and

has taken a very considerable interest in its business, and is familiar with the transacting of all of its business of any consequence. The witness further testified that he was familiar with the execution of the agreement attached to the complaint as Exhibit B; that the company did not receive any money, property or labor performed in consideration of that agreement. The witness further testified that he was familiar with the mortgage executed by that company (see Exhibit C attached to the complaint), and that the company did not receive any money, property or labor performed in consideration of that mortgage; that the consideration received by that company for these two instruments (Exhibits B and C attached to the complaint) was the extinction of the competition of the Title Insurance & Investment Company of Tacoma as an active abstract-making concern. The witness further testified that at the time these agreements were executed in 1911 the Commonwealth Title Trust Company, the Title Insurance & Investment Company of Tacoma and the Tacoma Title Company were engaged in the abstract business in Tacoma, the latter company for about a year. The Commonwealth Title Trust Company and the Title Insurance & Investment Company of Tacoma were doing practically all of the business, and that when the plant of the Title Insurance & Investment Company was boxed up and shipped to Portland, the Commonwealth Title Trust Company did substantially all the business. The witness further testified that an abstract plant consisted of abstracted copies of all instruments filed at the county court house affecting the title to real estate

in the county, together with indexes to make these records available in the making of abstracts; that the abstract business consisted of making and selling abstracts of title to real property. An abstract of title is made by taking a list of the instruments affecting the title to the particular piece of property from indexes of the abstract company. Then such instruments as are kept in stock are taken and those not kept in stock are copied and put together with a certificate that these instruments constitute all recorded instruments affecting such title between the dates specified, which is then fastened together, bound, delivered to the customer, the price being fixed by the number of instruments shown in the abstract at a certain price per instrument. The abstract plant contains copies of the essential portions of all of the instruments affecting the title to real estate in Pierce County, made by stenographers kept by the abstract company at the court house constantly, who copy the essential portions of all instruments filed every day, and send them down to the office where it is kept in permanent form. If an order comes for an abstract on a particular piece of property, we do not go to the court house for the information, but it is gotten from the company's permanent files kept on hand. Numbers of abstracts are made up and kept on hand. Some portions of abstracts are made up and kept in stock, relating to the original plat and additions thereto of Tacoma, and all the company has to do is to take these instruments from stock on hand, and the same way with other additions. In the preparation of abstracts the Commonwealth Title Trust Company employs from

six to fifteen persons, according to the demand from time to time. The witness further testified that he had experience in the purchase and sale of real estate in Pierce County, both for himself and as attorney for others, for fifteen or eighteen years to a very considerable extent; that it would not be possible to sell or make loans upon real estate of any particular value without an abstract from one of the companies engaged in the business; that applies to all the time that I have been here in business, for about fifteen years. The witness then identified a writing containing an agreement of A. D. Willoughby and O. M. Smith relating to their engaging in the abstract business in Pierce County, which agreement was offered and received in evidence and marked Defendants' Exhibit B, and testified that the same was delivered about the time that the other papers in the transaction were executed and delivered, and as a part of the same transaction.

Attorneys for plaintiff stated in open court that for the purpose of the record they would admit the signatures to Defendants' Exhibit "B," to be the signatures of Smith and Willoughby mentioned in the pleadings.

On cross examination the witness testified that his recollection was that the several instruments were signed in the evening and that the letter of Smith and Willoughby was to be brought in the next morning, and it was so brought in in the morning. The negotiations had taken some days and culminated in the formal executions of the written instruments on December 2nd, 1911; that the Willoughby-Smith agreement had been discussed and reached before the papers were executed.

Willoughby and Smith had the papers prepared and omitted the agreement contained in the letter. It was not the witness' recollection that the letter was the result of a conversation with Mr. Willoughby which took place after the other negotiations had culminated in the formal execution of the papers. The witness further testified that he understood that the county auditor is under a substantial bond, that the reason a purchaser or mortgagee of real estate would not accept an auditor's abstract of title was that an auditor did not have the means to prepare an abstract upon which people could rely; in practice it is impossible for him to make a reliable abstract even though under bond, for purchasers and lenders are not looking for a suit on the bond but for a reliable abstract. It is a physical impossibility for the auditor to make reliable abstract. The witness further testified that all the sources from which an abstract is made are open to the public or to any one who desires to go into the abstract business. An abstract company cannot begin to transact business from the day it opens its office, and produce accurate abstracts, although in some instances the public will accept them. The witness further testified that he knew Mr. Swanson and Mr. McFarland of the Tacoma Title Company as experienced abstract men, but did not know the amount of business done by the company in December, 1911, except by his general familiarity with the abstract business in Pierce County, but would estimate that amount at ten per cent, sixty per cent being done by the Commonwealth Title Trust Company and thirty per cent by the Title Insurance & Invest-

ment Company. The Wilson option of purchase expired December 6, 1911, but the lease extended to December, 1913, when the Wilson plant was leased to the Tacoma Title Company and has been operated by that company since that time. When the plant of the Title Insurance & Investment Company of Tacoma was boxed up and put in cold storage, the Commonwealth Title Trust Company was able to get a greater part of its business. The Tacoma Title Company was competing to a small extent and its business was growing slightly and when it took over the Wilson plant its business increased so that now it may be doing twenty-five or thirty per cent of the business; would be surprised to learn that it had done forty per cent of the business since 1914. The witness further testified that the reason it was practically impossible to sell or mortgage real estate without an abstract company's abstract was that the company abstract would carry as great a responsibility as a county auditor's abstract, although such companies are not under bond and are responsible only to the extent of their assets; abstracts of title have no general market value, but have a limited market value to persons interested in the property covered by the abstract. You could offer for sale to the general public either at auction, execution sale, or otherwise, and have a value put upon the abstract. For instance, there would be a very general sale of abstracts of title to all property within the limits of a townsite of Tacoma covering several sections of land, because down to the plat, and including a great many instruments filed after the plat, the instruments are the same in all abstracts, which would be com-

piled affecting that property. These abstracts would be of general value to many owners of thousands of lots. The general price for abstracts for many years had been \$1.00 per instrument, which has been cut at times but never exceeded. Witness stated that the consideration of the Commonwealth Company for its guaranty was the putting out of business of the abstract plant of the Title Insurance & Investment Company of Tacoma, and keeping it out of business, and that it received no other consideration; but that the Title Insurance & Investment Company of Tacoma received as consideration the satisfaction of its former notes and mortgage, an extension of time for the unpaid balance and the elimination of loss by operating the plant and the threat of foreclosure; that the benefits of these considerations flowed to the stockholders of that company who were substantially identical with the stockholders of the Commonwealth Title Trust Company. The witness further testified that at the time the guaranty of the Commonwealth Title Trust Company was made, there was a doubt on the part of Mr. Hayden, representing Mr. Willoughby and Mr. Smith, and the witness as to the valid binding force and effect of that company's guaranty. The individual guarantors gave the guaranty that was given there, because it was insisted upon, and that was the reason it was given. There was no intent or purpose to perform an illegal act. We did not consider at that time that we were performing an illegal act, but since looking up the authorities I have had to change my mind about it. At the time Mr. Hayden and myself considered the matter care-

fully, and determined that the action was not illegal, but we considered it a close question. In plaintiff's Exhibit "B," attached to the complaint, the words, "in consideration and acceptance of the foregoing guaranty and agreement by the Traders Trust Company, and other valuable consideration," refer alone to the acceptance of the contract of the Traders Trust Company. There was nothing to cover the clause "other valuable consideration." The words "in the resolution of the stockholders," contained in the agreed statement of facts, and in Defendants' Exhibit 3, attached to the answer, "in consideration of the advantages and benefits accruing to and arising out of the transaction," refer to the putting out of business, and out of competition of the abstract plant and business of the Title Insurance & Investment Company of Tacoma, and the preventing of anybody else coming in and using and foreclosing the mortgage, and the preventing of anybody else coming in and starting up with a plant. Those are the only advantages and benefits which flowed to the Commonwealth Company in the execution of the guaranty agreement. The stockholders of the Commonwealth Company were not relieved of any onerous provision. There was no liability resting upon the stockholders of the company.

On re-direct examination the witness testified: Both Mr. Hayden and myself considered it a close question as to whether the contract of guaranty was legal or not. Mr. Hayden had considerably more doubt about the legality of it than I had, and that same doubt obtained as to the guaranty of the individuals; the same

question as to whether or not it was of any binding force and effect, and Mr. Hayden had more serious doubts as to its legality than I had, and so expressed himself. The witness further testified that the considerations recited in the Commonwealth Title Trust Company's guaranty benefited that company only by getting the plant of the Title Insurance & Investment Company out of the way and avoid a possibility of its falling into hostile hands by foreclosures. As a matter of fact they were insisting upon these new notes being made, and a new mortgage being given by the Title Insurance & Investment Company, and it was the only way this plant could be put out of business, and a foreclosure prevented. We intended to carry out the agreement, but could not do so, because the abstract business did not earn enough to do so, and as the whole series of arrangements from 1909 on was for the benefit of all concerned, including Smith and Willoughby, we felt that the depreciation in business should be considered by them as well as by us in reaching an adjustment based on actual conditions. We endeavored to reach such an adjustment to avoid a law suit; they had already received \$20,000 on the principal debt and about \$22,000 interest. We offered to turn over the lot which was covered by the Commonwealth mortgage, provided the obligations of the Commonwealth Company under this guaranty should be released, so as to stop the whole thing, and they could take their plant and go back into business, but that was not satisfactory. We were unable to make any adjustment. We have other negotiations involving other particular offers, but nothing was ac-

completed, and then this suit was brought. The witness further testified that the cost of an abstract by a county auditor would be much greater than the cost of one prepared by an abstract company. The witness further testified that all of the papers in the matters considered in Dec. 1911 were prepared by E. M. Hayden as attorney for Smith and Willoughby, including the record of corporate actions, and it was a material part of the agreements that Smith and Willoughby should keep out of the abstract business in Pierce County during the life of the agreements. The other papers were executed in the evening and it was then discovered that this particular agreement was not included and Willoughby and Smith were told to prepare it and bring it in the next morning which they did. The witness further testified that he had never seen or heard of an abstract prepared by the county auditor and that such an abstract would have no marketability.

On re-cross examination the witness testified that some abstracts are on the market, particularly those relating to property within the plat of New Tacoma which could be obtained from the Tacoma Land Company. The reason an auditor's abstract would have no marketability was that the impossibility of the preparation of an accurate abstract by an auditor is apparent. The witness further testified that while changes were made in the original draft of the contracts and other writings between the parties no change was made to include the agreement of Smith and Willoughby to keep out of the abstract business in Pierce County nor was this matter referred to in the corporate resolution authorizing the

contracts. The witness further testified that while the holders of the 1909 mortgage referred to let matters stand as they were under that mortgage, it was not possible to meet the obligation therein undertaken and to avoid foreclosure which might bring the property into hostile hands the contracts of 1911 were made; that to meet the doubt as to the taint of monopoly and restraint of trade in the Commonwealth Title Trust Company's guaranty the guaranty of the individual defendants was demanded and made; the doubt was not as to the corporate power to make such guaranty but was as to its monopolistic tendency. Counsel for plaintiff then stipulated that Horace Fogg, Franklin Fogg and H. H. Gove, individual defendants herein, if called as witnesses would testify upon direct and cross-examination as to the nature of the abstract business and its methods of business to the same effect as the witness Fred S. Fogg, which stipulation was accepted by the counsel for defendants and by the court.

Horace Fogg, one of the individual defendants, being called by the defense and sworn, testified that he was the president of the Commonwealth Title Trust Company in December 1911, and had been for sometime, and took an active part in the negotiations which led up to the execution of the various instruments on December 2nd, 1911, as such president. There was no money paid to the Commonwealth Title Trust Company; neither was any property received by the Commonwealth Title Trust Company, nor was any labor done for the Commonwealth Title Trust Company, for the execution of the contract of guaranty, and the mortgage by the

Commonwealth Title Trust Company, attached to the complaint, marked "Exhibits B and C," and the only consideration moving to the Commonwealth Title Trust Company for the execution of those instruments was the elimination of competition by the boxing up of the T. I. & I. Company's abstract plant at Tacoma, and shipping it out of the County, and thereby preventing the foreclosure of the mortgage thereon, and the re-entry of that plant into active competition with the Commonwealth Company, either through Smith or Willoughby, or through the sale to some other party. The witness further testified that the matter of Smith and Willoughby keeping out of the abstract business in Pierce County had been discussed and agreed to before any of the papers were executed and was a material part of the consideration; that Mr. Hayden as their attorney had drawn and submitted the papers and it was then discovered that the Smith-Willoughby agreement had been omitted, which omission Smith and Willoughby agreed to supply, which they afterward did by the paper in evidence as Dft. Exhibit "B." The witness further testified that in 1911 these companies were in the abstract business in Tacoma: the Commonwealth Title Trust Company which did about sixty per cent of the business, the Title Insurance & Investment Company of Tacoma which did about thirty per cent and the Tacoma Title Company which did about ten per cent; that after the Title Insurance & Investment Company went out of business in Dec. 1911 the Commonwealth Title Trust Company did ninety per cent of the business, although thereafter the business of the Tacoma Title Company

began to grow. On Dec. 2nd, 1911, the Commonwealth Title Trust Company employed twelve persons and the Title Insurance & Investment Company employed ten persons.

On cross examination the witness testified that his testimony as to the business done by the several companies was an estimate only, without accurate information. The witness further testified that in stating that the consideration for the Commonwealth Title Trust Company's guaranty consisted only of the elimination of competition of the Title Insurance & Investment Company's plant and avoidance of its foreclosure under the mortgage, he did so because under the management of that plant by Mr. Gove price cutting had been eliminated but if the plant returned to Smith and Willoughby, or some hostile party, price cutting was sure to be resumed. The witness further testified that the omission of the personal agreement of Smith and Willoughby was discovered when Mr. Hayden brought the papers for execution and was mentioned in Mr. Hayden's presence, when either Hayden, Smith or Willoughby said it was an inadvertance and the omission would be supplied; afterward they prepared the paper and delivered it; it was not prepared in our office, nor were the corporate resolutions.

On re-direct examination the witness testified that after the agreemnts of Dec. 1911 were made the abstract business decreased so that the payments required by the guaranty of the Commonwealth Title Trust Company could not be made. Negotiations were begun for some new arrangement by letters in evidence and also by

a letter from witness to Willoughby admitted in evidence and marked Dft. Ex. "C," the property therein referred to being that covered by the mortgage in suit. Other offers were made to release all claim to the mortgaged plant, or to give certain tide land property for the plant. Thereafter in Feb. or March, 1915, we were advised by counsel that the contracts were illegal and without sufficient consideration; no offer to compromise was made after this advice was received. They demanded the entire amount due under the contracts and then brought suit.

On re-cross examination the witness testified that no demand was made in excess of the obligation of the contracts; that other offers were made to witness which he did not consider as a compromise because in view of counsel's advice as to the want of validity of the contracts, the offers seemed more binding than the original agreements; after that advice was received we made no attempt to compromise except on the basis of the cancellation of the Commonwealth Title Trust Company's agreement.

After counsel's advice to us that it was illegal, he very strongly advised us to refuse to act under it, and do anything to settle, so any attempts made to compromise were on the possibility of cancelling the Commonwealth agreement, and refusing to act under it, and not to compromise on the promise of carrying out the agreement. It was a question of its being a serious thing to continue to operate. It is not a fact that the offers made by us were much less in amount and value immediately after getting Mr. Bates' advice that it was purely an

illegal contract. We certainly were willing to make the same offers we did before.

Franklin Fogg, one of the individual defendants, being called by the defense and sworn, testified that as manager of the Commonwealth Title Trust Company he took part in the negotiation of the contracts of Dec. 1911; that no money, property or labor performed was received by that company in consideration of its guaranty and mortgage of that date; the consideration for it was the boxing up and the removal of the so-called Smith & Willoughby abstract plant from the county from active competition, and the preventing of the foreclosure of the mortgage on that plant, and its falling into the hands of anyone who would put it in active operation as a hostile competitor and to prevent it getting back in that shape, or any shape. The witness further testified that the agreements of Smith and Willoughby to keep out of the abstract business in Pierce County, contained in Dft. Ex. "B," were discussed and agreed to prior to Dec. 2nd, 1911, and were a principal part of the negotiations and agreements. When the papers which Mr. Hayden had prepared were examined by Fred Fogg he discovered that this particular agreement had been omitted. I think Mr. Smith had gone at this time and Willoughby's attention was called to the omission. He went after Smith and returned either that evening or the next morning with the written letter. The witness further testified that prior to Dec. 2nd, 1911, three companies were in the abstract business, the Commonwealth Title Trust Company doing sixty per cent of the business, the Title Insurance & Investment Company

doing thirty per cent and the Tacoma Title Company ten per cent. After the Title Insurance & Investment Company plant was shipped to Portland the Commonwealth Title Trust Company did about ninety per cent of the business. On cross examination the witness testified that the proportion of business by the Tacoma Title Company had increased and the business of the Commonwealth Title Trust Company had decreased so that probably the Tacoma Title Company was now doing forty per cent of the business. The witness further testified that the agreements of Dec. 1911 were made to avoid the foreclosure of the 1909 mortgage, that it was a new deal in which the Title Insurance & Investment Company of Tacoma, whose stockholders were practically identical with the stockholders of the Commonwealth Title Trust Company, got the benefit of the extension of the time of payment from nine years to thirty-two years, the reduction of the interest rate from seven per cent to five per cent.

On re-direct examination the witness testified that the payments on the mortgage of 1909 were made by the Title Insurance & Investment Company of Tacoma out of its earnings.

By agreement of counsel the exhibits attached to the complaint and to the answer of defendants were admitted in evidence.

J. L. Wadsworth, a witness called by the defense, being sworn, testified that he had been auditor of Pierce County in 1913-14 but had made no abstracts of title; had received inquiries for abstracts but had referred such inquiries to the abstract companies. It is not practical

for the auditor to make abstracts because he has no tract indexes, which are chains of title by which one sale can be followed to another. Grantor and grantee indexes are the only ones kept by the auditor, a search of which would not show all instruments affecting title; under present conditions the only way an auditor could procure an abstract would be to get it from an abstract company. The auditor would have to examine all the records of his and other offices. He has authority to examine other county offices but no authority to examine city or United States Court offices, and would certify only to what appeared of record in his own offices. It is the general practice to obtain abstracts from the abstract companies and has been for some years past.

On cross examination the witness testified that he was familiar with the laws relating to the duty of the auditor to make abstracts of title but was under the impression that a later law had relieved him of that duty. The auditor could not prepare an abstract without a tract index. Copies of the daily abstracts made by the abstract companies from the auditor's records were delivered to the county assessor and were available to the auditor. When inquiries for abstracts were received the inquirer was referred to the abstract companies without being informed that it was the auditor's duty to prepare an abstract if requested so to do.

On re-direct examination the witness testified that an auditor to make an abstract would have to examine the records from the beginning which would require much time and be very expensive.

James H. Davis, a witness called by the defense, be-

ing sworn, testified that he had been county auditor from 1901 to 1905; had received applications for abstracts of title but did not make them but referred the application to the abstract-companies; did so because it is impractical for the auditor to make abstracts because he has not all of the records which go to make up an abstract. He has no tract index, only a grantor and grantee index. To prepare an abstract the auditor would have to examine the record back to the government title which would be very expensive; an abstract company could make it in much less time. The custom is to get abstracts from the abstract companies. Sales and mortgages of real estate require such an abstract.

On cross examination the witness testified that the auditor is entitled by law to charge seventy-five cents an hour for searching the records and would be entitled to that fee for preparing an abstract, which would run back to the government title whether prepared by the auditor or an abstract company.

C. A. Campbell, a witness called by the defense, being sworn, testified that he was now a deputy auditor of Pierce County and had been a deputy auditor in 1909-10-11; that applications for abstracts had been made to the auditor but no abstracts had been made, the applications being turned over to the abstract companies.

It was stipulated by counsel that W. A. Stewart if called as a witness would testify that he was auditor of Pierce County from 1908 to 1912 and would testify in other respects to the same effect as the witness Campbell.

It was further stipulated by counsel that in the event the court should allow an attorney's fee to the plaintiff, the amount should be fixed by the court without evidence thereof.

REBUTTAL.

Elmer M. Hayden, a witness called by the plaintiff in rebuttal, being sworn testified that he was attorney for Smith and Willoughby in the matters relating to the contracts of Dec. 1911 and as such had several conferences with Fred S. Fogg, who represented the parties on the other side; that at no time prior to the execution of these contracts was any question as to their invalidity as monopolistic or in restraint of trade mentioned or discussed, but the corporate power of the Commonwealth Title Trust Company to make its contract of guaranty was discussed and was regarded as a debatable question, to meet which it was determined to take the guaranty of the individuals interested in that company of the validity and binding effect of the agreement. The witness further testified that he never had seen the paper containing the agreement of Smith and Willoughby to keep out of the abstract business in Pierce County nor was there any discussion of the subject matters to his knowledge at any time during the negotiations, nor had he ever heard of the matter until within an hour of the time he went on the witness stand.

On cross examination the witness testified that he did not know or undertake to say whether the Smith-Willoughby agreement had been discussed before witness came into the negotiations.

C. E. McFarland, a witness called in rebuttal by the plaintiff, being sworn, testified that he had been in the abstract business for a number of years, being employed by the Commonwealth Title Trust Company for eight or ten years prior to March, 1914, when he left their employ and became interested in the Tacoma Title Company. While in the employ of the Commonwealth Title Trust Company he had attended to the counter business and made collections and knew the amount of business done by them. Had performed similar services for the Tacoma Title Company and knew the amount of business done by them. On March, 1914, the Commonwealth Title Trust Company was doing substantially sixty per cent of the business and the Tacoma Title Company substantially forty per cent, which proportion remains substantially unchanged.

A. L. Swanson, a witness called in rebuttal by the plaintiff, being sworn, testified that he had been in the abstract business for twenty years, and connected with the Tacoma Title Company since 1911. That company had been then and at all times since then was and is now actively engaged in the abstract business and is equipped to do a general abstract business of all kinds.

A. D. Willoughby, a witness in rebuttal by the plaintiff being sworn, testified that in all the negotiations leading up to the agreements of Dec. 1911 there was no discussion on the part of any one of any intent or purpose to withdraw from competition or prevent the use in competition of the abstract plant upon which the Traders Trust Company then held a mortgage lien. The negotiations were confined to the endeavor on my part

and Mr. Smith's part, representing the Traders Trust Company, to obtain payment of or a satisfactory security for the debt secured by the mortgage. The witness further testified that the agreement of witness and Smith to keep out of the abstract business in Pierce County had been obtained under these circumstances; a few days after the negotiations of Dec. 1911 had been concluded and the final papers signed, I had a conversation with Franklin Fogg in which I told him that Smith had got into trouble in Portland by agreeing to keep out of a business and breaking his agreement. Fogg said to me "We will take your word for it, Willoughby, that you won't go back into business because we would not want to buy you out and then have you start in business in opposition to us the next day, and under the circumstances I would not care to take Smith's word and we would rather have something in writing that you would not go back into business." I told Fogg to have a writing prepared, which was done, and I took it to Smith and he signed it. This was several days after the other matter of Dec. 2nd was closed up.

On cross examination the witness testified that at the time the negotiations of 1911 were under way there was no interest or other payment under the mortgage of 1909 due and unpaid but that an installment of interest was due December 2, 1911.

On redirect examination the witness testified that neither the Traders Trust Company or any one in its behalf had threatened to foreclose its mortgage prior to Dec. 2nd, 1911, for at that time there had been no default under the mortgage.

O. M. Smith, being called in rebuttal by the plaintiff and sworn, testified that at no time during the negotiations which led up to the agreements of Dec. 2nd, 1911, had there been any mention or discussion of any purpose to retire the plant then in the control of the Title Insurance & Investment Company from competition; that this negotiation had been confined to the payment of the 1909 mortgage or security for its payment. There had been no discussion of any agreement by witness and Willoughby not to re-enter the abstract business. Witness first heard of the matter when Willoughby, some days after the contracts of Dec. 2nd, 1911, had been closed, brought the letter to witness which witness signed and returned to Willoughby. Witness further testified that prior to Dec. 2nd, 1911, neither the Traders Trust Company or any one in its behalf made any threat to foreclose the 1909 mortgage then held by that company.

EXHIBITS.

During the trial exhibits were offered and received in evidence as follows:

Plaintiff's Exhibits—

Thirty-two notes, each in the sum of \$2500, payable one each year on December 7th from and including 1915 to 1946. These notes are similar in form and terms to the first note, which is as follows, the written parts being *italicized*:

\$2500.00 *Tacoma, Wash., December 2nd, 1911.*

On or before Dec. 7th, 1915, after date, without grace, we promise to pay to the order of The Traders

Trust Company of Oregon, Two Thousand Five Hundred and No/100 Dollars in Gold Coin of the United States of America of the present standard of value with interest thereon, in like Gold Coin, at the rate of five per cent per annum from date hereof, until paid, for value received. Interest to be paid semi-annually at Tacoma and, if not so paid, the whole sum of principal and interest to become immediately due and collectible, at the option of the holder of this Note. And in case suit or action is instituted to collect this Note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, a reasonable sum—Dollars in like Gold Coin for attorney's fees in said suit or action.

Due Dec. 7th 1915

*The Title Insurance and Investment Co. of Tacoma
At Tacoma Wash. Pac. Nat. Bank.*

By H. H. Gove P.

Endorsements:

Interest paid to June 7, 1913.

Traders Trust Company of Oregon

By A. D. Willoughby Pres.

O. M. Smith Sec'y.

Interest paid to Dec. 7, '13 W.

Interest paid to June 7, '14 W.

Plaintiff's Exhibit No. 2.

Original agreement between Commonwealth Title Trust Company and Traders Trust Company of Oregon, attached to bill of complaint as Exhibit B and printed in full in this record at pages 25-29.

Plaintiff's Exhibit No. 3.

Stipulation of Facts to be taken as evidence printed in full in this record at pages 75-114.

Plaintiff's Exhibit No. 4.

Agreement between Title Insurance and Investment Company of Tacoma and Traders Trust Company of Oregon attached to bill of complaint as Exhibit A and printed in full in this record at pages 21-24.

Plaintiff's Exhibit No. 5 (Same as Exhibit 2.)

Agreement between Commonwealth Title Trust Company and Traders Trust Company of Oregon attached to bill of complaint as Exhibit B and printed in full in this record at pages 25-29. •

Plaintiff's Exhibit No. 6.

Mortgage given by Commonwealth Title Trust Company to Traders Trust Company of Oregon attached to bill of complaint as Exhibit C and printed in full in this record at pages 30-34.

Defendants' Exhibit A.

Articles of incorporation of Commonwealth Title Trust Company as follows:

KNOW ALL MEN BY THESE PRESENTS:
That we William E. Bliven, Herbert H. Gove and Horace Fogg, the undersigned, have this day associated our-

selves together for the purpose of forming a corporation under, by virtue of, and pursuant to the laws of the State of Washington, for the objects hereinafter specified, and for those objects do make, subscribe, adopt and execute in triplicate these written Articles of Incorporation and certify as follows:

I.

The name of this corporation is and shall be Commonwealth Title Trust Company.

II.

The objects for which this corporation is formed are: To make and sell abstracts of title of property; to conduct and carry on a general abstract of title, title insurance and certificate of title business in the State of Washington and elsewhere, and to acquire books, papers, records, files and information pertaining to said business; to compile from the public records of Pierce County, Washington, and from the public records of each of the other counties of said State and any other state or territory and from all public records of the United States, cities, towns, counties, school districts, and all other records and sources of information whatsoever, abstracts of title to lands and real estate and information relating thereto, and to prepare, certify to, furnish and sell the said abstracts and information; to examine, certify and issue certificates of title to land and to do any and all acts which are necessary to be done in carrying on and conducting said business.

To act as agent for any person, firm, corporation or body politic.

To publish, buy, sell, and deal generally in legal blanks, books and all other personal property.

To purchase, own, hold, sell, lease or hold, improve, manage, and deal in real estate for itself or as agent or trustee for others.

To do a general mortgage, loan and trust business.

To buy, sell, assign, discount, and negotiate mortgages, promissory notes and any and all other evidences of debt for itself and also as agent or trustee, and to accept and execute all trusts, fiduciary or otherwise, that may be committed to it by any person, firm, or corporation, or by the order or direction of any court.

To act as fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money.

To transfer, register and countersign certificates of stock, bonds, or other evidences of indebtedness, and to act as agent or trustee of any corporation, foreign or domestic, for any purpose now or hereafter required by statute or otherwise.

To act as trustee under any mortgage or bond issued by any municipality, body politic, corporation, firm, or individual, and to execute any and all trusts not inconsistent with the laws of this state.

To receive and manage the sinking fund of any corporation upon such terms as may be agreed upon between such corporation and those dealing with it, and generally to execute trusts of every description not inconsistent with the laws of this state or of the United States.

To act as administrator, guardian, or receiver under the appointment of any last will or testament, or order of any court.

To act as agent for any fire insurance company or companies.

To buy, own, hold, and sell shares, bonds, and debentures of any government, state, corporation, school district, county, city or any other body or authority.

To loan money and to accept as security therefor and all kinds of personal property and mortgages upon real or personal property or both.

To acquire the goodwill, rights, property, and assets of all kinds of any person, firm or corporation dealing in abstracts of title, or owning an abstract of title plant, and to acquire any and all abstract books, files, records and all property and matters pertaining thereto.

To purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property and any rights or privileges which the company may deem necessary or convenient for the purposes of its business.

To conduct its business and have one or more offices and unlimitedly and without restriction to hold, purchase, lease, mortgage and convey real and personal property in the State of Washington, and in the several states and territories of the United States, the District of Columbia, colonial possessions or territorial acquisitions of the United States and in foreign countries, as shall from time to time be found necessary or convenient for the purposes of the business of this company.

To execute contracts with any person, firm, corporation, city, county, township, school district, or any state or territory or colony thereof or of any foreign government, to receive, accept, hold, and deliver money, papers, and documents in escrow or in trust.

To carry on the business of buying, selling, negotiating, issuing and registering bonds, discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, receiving deposits of money, buying and selling exchange, coin and bullion; to maintain and let safe deposit vaults, to insure persons having any interest in real estate, either as owner, lessee, mortgagee, judgment creditor or otherwise, against loss by reason of defects of title, or because of liens or encumbrances charging the same.

To purchase, lease, exchange, hire or otherwise acquire any and all rights, privileges, premises, or franchises suitable or convenient for any of the said purposes or objects.

To do any or all of the things in this certificate and in these Articles of Incorporation set forth as objects, purposes, or otherwise, to the same extent and as fully as natural persons might or could do.

It is the intention that the objects specified and clauses contained in this paragraph shall, except where otherwise expressed in said paragraph, be nowise limited or restrained by reference to or inference from the terms of any other clause of this or any other paragraph in this charter, but that the objects specified in each of the clauses of this paragraph shall be regarded as independent.

This corporation shall have all the powers set forth, enumerated, and contemplated by the laws of the State of Washington.

III.

The time of the existence of this corporation shall be fifty years from and after the date of its incorporation.

IV.

The number of trustees who shall manage the business, affairs and concerns of this corporation shall be three, and the names and residence of those who shall serve as trustees until the first Monday of July, 1902, are:

William E. Bliven, residence Tacoma, Wash.

Herbert H. Gove, residence Tacoma, Wash.

Horace Fogg, residence Tacoma, Wash.

In witness whereof we, the undersigned citizens of the United States and of the State of Washington and residents of the City of Tacoma in said state, have and do hereby execute this certificate and these Articles of Incorporation in triplicate this 24th day of February A. D. 1902.

W. E. Bliven (seal)

Herbert H. Gove (seal)

Horace Fogg (seal)

(Acknowledgment in common form)

Defendants' Exhibit B.

Letter and agreement of A. D. Willoughby and O. M. Smith to the Title Insurance and Investment Company of Tacoma, dated December 2nd, 1911, attached to the answer of defendant Commonwealth Title Trust Company as Exhibit 2, and printed in full in this record at page 57.

Defendants' Exhibit C.

Letter from defendant Horace Fogg to A. D. Willoughby at Portland, Ore., as follows:

Tacoma Wash. March 3rd 1915.

Mr. A. D. Willoughby,
Portland, Ore.

Dear sir:—

Referring to your letter of the 1st. you told me in Portland that you and Mr. Smith would come here about the 1st. of March with some kind of proposition whereby the plant could be traded at least the Commonwealth would be released. If you could see your way clear to accept the office lot in exchange for the notes and interest due up to 1921 you would have a property upon which you could have at once raise probably ten thousand dollars if necessary and would be much better security for the bank.

The first of last week I turned the entire matter over to Major Bates to give his opinion upon the legality of the agreement, but he was called to San Francisco and until his return on Saturday or Sunday of this week I am unable to state what our position will be in the matter.

Yours very truly

Horace Fogg.

Defendants' Exhibit D.

Original mortgage given by the Title Insurance and Investment Company of Tacoma to the Title Insurance and Investment Company of Washington, bearing date of December 7th 1909, attached to the answer of the defendant Commonwealth Title Trust Company as Exhibit 1, and printed in full in this record at pages 50-57.

The testimony then closed and further proceedings were postponed until August 7th, 1916, when both sides submitted briefs and the case was argued. On Sept. 28, 1916, the court rendered its opinion in writing as follows:

OPINION OF THE COURT.

This is an action brought by the Lumbermen's Trust Company, an Oregon corporation, against Title Insurance & Investment Company of Tacoma, a Washington corporation (hereinafter called T. I. & I. Company of Tacoma), Commonwealth Title Trust Company, a Washington corporation, (hereinafter called Commonwealth Company), Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, the object of which is to recover judgment against T. I. & I. Company of Tacoma for Eighty Thousand Dollars and interest, and for a decree of foreclosure and sale of the property pledged and mortgaged to secure said indebtedness.

Second: For a judgment against the defendant Commonwealth Company on an instrument of guaranty, and for a decree of foreclosure of a mortgage given to secure said guaranty, and a prayer for alternative relief that if for any reason the agreements and undertakings of the Commonwealth Company be found by the court to be not valid, then the plaintiff have judgment against the defendants Foggs and Gove for such sum as may be found by the court to be due upon the guaranty of the Commonwealth Company, and also for costs and disbursements, including an attorney fee of Ten Thousand Dollars.

The defendants Commonwealth Company and T. I. & I. Company of Tacoma filed separate answers and by stipulation the answer of the Commonwealth Company is to be taken and considered as the answer of the individual defendants Foggs and Gove. The defendants by these answers admit the execution of the pledge by the T. I. & I. Company of Tacoma of its property, the guaranty and mortgage of the Commonwealth Company, and the guaranty of the Foggs and Gove, but deny that there was any valid consideration for the execution of either or any of them.

Defendants as affirmative defenses to the complaint alleged:

(a) That the complaint does not state facts sufficient to constitute a valid cause of action in equity against the defendants, or either of them, nor are the facts stated therein sufficient to entitle plaintiff to any relief against the defendants, or either of them.

(b) That all of said instruments and agreements set forth in the complaint were, and are, illegal and void, and of no force and effect, for the reason that the sole and only consideration for the executing of the same was for the purpose of removing and restraining rivalry and competition in the abstract business in Pierce County, Washington, and were in restraint of trade and competition, and were for the purpose of giving the defendant Commonwealth Company a monopoly of said business.

(c) That the Commonwealth Company was, and is engaged solely in the business of making and selling abstracts of title to lands in Pierce County, and maintaining an abstract plant at Tacoma in said County and

State. That it was not authorized by its articles of incorporation, nor was it engaged in the business of becoming surety or guarantor for any person, firm or corporation for the contracts, undertakings or obligations or third parties. That the guaranty and mortgage or the Commonwealth Company and that of the Fogg and Gove were made and executed wholly without consideration, and said Commonwealth Company neither directly or indirectly received any consideration, or money, or property or labor, or thing of value therefor, or in connection therewith, nor were its assets in any way increased thereby.

The cause was first called up by the attorney for the plaintiff asking the fixing of a trial date. I advised the plaintiff's attorney that I was a lien creditor of one of the individual defendants and therefore considered myself disqualified to try the cause as it might result in the obtaining of a judgment against such defendant which would constitute a lien on the same property upon which I held a lien. Shortly thereafter, and prior to the securing of another judge to try the cause, such individual defendant paid the claim held by me, whereupon I advised the attorney for the plaintiff of the fact of the settlement of such claim, when he again called the cause up for the fixing of a trial date, when I advised him that I considered my disqualification removed by the payment of the debt due me, but if he was of the opinion that the claim having been paid during the pendency of the action affected my eligibility, that he should file an affidavit disqualifying me. This he declined to do, but asked to have the case set down for trial before me.

This cause was tried by the court upon stipulation as to the facts.

T. I. & I. Company, of Washington, a corporation, of which A. D. Willoughby and O. M. Smith and wife were the sole and only stockholders; Commonwealth Company, of which the Foggs and Gove, and executors of the estate of Charles S. Fogg, deceased, were the sole and only stockholders, and Wilson Title & Abstract Company, a corporation, (hereinafter designated as the Wilson Company), in which R. C. Wilson was substantially the sole stockholder, each maintained, owned and operated in the City of Tacoma, an abstract business, used, and intended to be used, for furnishing abstracts of title of property within Pierce County, Washington.

That during all of said time the said companies had carried on business in active and actual competition with each other, and for many years prior to said date said companies owned and controlled the only abstract plants in said County, and transacted all of the abstract business therein.

That the competition between said companies was very keen, and they were cutting prices.

That for some days prior to December 6th, 1909, the Foggs, Willoughby and Smith had been negotiating the sale of the abstract plant of the T. I. & I. Company of Washington to a corporation to be formed.

That during said negotiations, and on the 6th of December, 1909, the Wilson Company executed and delivered to Willoughby, then in the actual management of the T. I. & I. Company of Washington, and Franklin Fogg, then in the management of the Commonwealth

Company, a lease and option to purchase the entire plant and business of the Wilson Company.

That on the 7th day of December, 1909, the said Willoughby by written assignment transferred to said Franklin Fogg his interest in said lease and option to purchase, a copy of which is attached to said lease and option. That by said lease it was provided among other things that said abstract plant should remain in the exclusive possession of the Wilson Company, but should not be operated, and in Paragraph V. it was further provided that said Wilson Company and its officers should not during the life of said lease start, or be interested in any other abstract plant in Pierce County, Washington.

That on the 7th day of December, 1909, the same day that Willoughby assigned his interest in the Wilson lease to Fogg, the T. I. & I. Company of Tacoma was organized, with a capital stock of \$5,000.00 and purchased from the T. I. & I. Company of Washington its abstract plant and business for the sum of One Hundred Thousand Dollars, payable Ten Thousand Dollars in cash, balance of Ninety Thousand Dollars secured by a mortgage upon the plant. Part control in the new company was preserved in the seller and the mortgage given provided that the mortgagor would use its best efforts to enlarge and build up the business. The original stockholders of said T. I. & I. Company of Tacoma were said Willoughby, one A. F. Albertson and F. A. Rice—Willoughby subscribing for forty-eight shares, and the other two for one share each, being the whole of the capital stock—two of the Fogg's indemnified him for his

subscription for such shares. That on said day the said Willoughby assigned his stock in blank and delivered it to Fred S. Fogg, and afterwards on the 30th day of December, 1909, the stock certificates in said T. I. & I. Company of Tacoma were surrendered and the same were duly issued to the Foggs and Gove for all of the capital stock of said company, the par value of which said stock was duly paid by said stockholders to the T. I. & I. Company of Tacoma.

The result of these transactions was to leave the entire abstract business in Pierce County in the hands of the T. I. & I. Company of Tacoma, and the Commonwealth Company, in which two companies the stockholders were substantially the same.

The said mortgage and notes of Ninety Thousand Dollars executed by the T. I. & I. Company of Tacoma to the T. I. & I. Company of Washington for the part purchase of the said abstract plant of the latter company were assigned to the Traders Trust Company of Oregon, an Oregon corporation, and that at all times mentioned in the complaint and answer the said Willoughby and Smith and wife were the officers and sole stockholders of the said Traders Trust Company of Oregon.

The T. I. & I. Company of Tacoma paid to the T. I. & I. Company of Washington the semi-annual interest on its mortgage, due June 7th, 1910, amounting to \$3,150.00, and a like amount on December 7th, 1910, and also paid the installment of principal of Ten Thousand Dollars, due December 7th, 1910. It also paid \$2,800.00, the interest due June 7th, 1911. Said payments amounting in all to \$29,100.00, and on the 7th

day of December, 1911, there would become due an interest payment of \$2,800.00, and an installment of principal of \$5,000.00.

During the summer of 1911 correspondence took place between Horace Fogg, a stockholder in both the Commonwealth Company and the T. I. & I. Company of Tacoma, and Willoughby, looking towards an adjustment of this mortgage indebtedness.

It is clearly shown from these letters and the other evidence that the T. I. & I. Company of Tacoma could not make this payment of interest and principal about to become due, and that some adjustment would have to be made, or the mortgage would be foreclosed and the plant taken back by the Willoughby and Smith interests, or sold under foreclosure sale to some third party and operated as a competing plant.

On said December 2nd, 1911, said Traders Trust Company of Oregon, being then the owner and holder of said notes and chattel mortgage, dated December 7th, 1909, executed by said T. I. & I. Company of Tacoma, and said last named company, executed and delivered to each other the pledge agreement, dated December 2nd, 1911, now sought to be foreclosed, and also the thirty-two notes, to secure which the same was given, all dated December 2nd, 1911, for the principal sum of \$2,500.00 each, making an aggregate sum of Eighty Thousand Dollars, the same being payable one note each year on and after December 7th, 1915, with interest thereon at the rate of 5% per annum, payable semi-annually.

At the same time, on said December 2nd, 1911, and as a part of the same transaction, said Traders Trust Company cancelled and delivered up to the T. I. & I. Company of Tacoma, the notes dated December 7th, 1909, that were executed by said T. I. & I. Company of Tacoma to evidence the deferred payments of the original purchase price of said abstract plant from said T. I. & I. Company of Washington. At the same time on said December 2nd, 1911, said Commonwealth Company executed and delivered to said Traders Trust Company of Oregon its guaranty agreement dated December 2nd, 1911, guaranteeing payment of the first seven of said thirty-two notes, and guaranteeing payment of the interest on all of said thirty-two notes to and including the interest due December 7th, 1921, and also executed and delivered its real estate mortgage to secure said guaranty agreement, and also a certified copy of the resolution of the stockholders and trustees of said Commonwealth Company, dated December 2nd, 1911, authorizing the same.

The undersigned, Fred S. Fogg, Herbert H. Gove, Horace Fogg, and Franklin Fogg, in consideration of the acceptance of the foregoing guaranty and agreement by the said Traders Trust Company of Oregon, and for other valuable considerations, do hereby agree and guarantee to and with the Traders Trust Company of Oregon, that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration, sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said Company. This guaranty by these in-

dividual defendants appears to have been given because of a question having arisen as to the binding effect of the guaranty and mortgage given by the Commonwealth Company.

Within a day or so after December, 1911, said Willoughby and Smith prepared, signed, and delivered an agreement not to enter the abstract business in Pierce County, the agreement being in the following words:

“To the Title Insurance & Investment Company of Tacoma, Washington,

Gentlemen:

In consideration of the agreements which have been this day made between you, the Title Insurance and Investment Company of Washington, the Commonwealth Title Trust Company and the Traders Trust Company of Oregon, we the undersigned individuals, who are the principal stockholders of the Title Insurance and Investment Company of Washington, and also of the Traders Trust Company of Oregon, do hereby covenant and agree that as long as the agreements on your part and on the part of the Commonwealth Title Trust Company and on the part of Fred S. Fogg, Horace Fogg, Franklin Fogg and Herbert H. Gove, are kept and performed, we will not, nor will either of us, directly or indirectly, as individuals, or through the medium of any corporation, transact an abstract business or a title insurance business in Pierce County, State of Washington.

IN WITNESS WHEREOF, We have hereunto set our hand this 2nd day of December, A. D. 1911.

A. D. Willoughby,
O. M. Smith.”

Although it is disputed that this was a part of the other transactions of December 2nd, 1911, the preponderance of the evidence shows that it was, and so understood. The very fact that the agreement was given the same date, to my mind, shows this. The Commonwealth Company never received any money or property, or labor on account of its execution of said guaranty agreement and real estate mortgage. The only benefits derived by it from the agreement being the extinction of competition that had previously existed—from the operating of the abstract plant by the T. I. & I. Company of Tacoma and the elimination of the risk, upon the collapse of the latter Company, of its plant coming into the possession of hostile interests to be operated in actual competition to the Commonwealth Company.

That immediately after said December 2nd, 1911, said abstract plant was shipped to Portland, Oregon, and placed in a vault, one of the keys of which was held by Traders Trust Company, and the other by a representative of that Company and the T. I. & I. Company of Tacoma, and has remained there ever since, all as provided in said agreements of December 2nd, 1911.

That at the time of the making and execution of said agreement of December 2nd, 1911, all of the abstract business in Pierce County was being transacted by the Commonwealth Company and the T. I. & I. Company of Tacoma, except about 10%. Far the major portion of the business transacted by the two companies being transacted by the Commonwealth Company—the 10% mentioned being transacted by a new company entering the field between 1909 and 1911. At the time of trial

the evidence showed that the percentage of business transacted by this new company had materially increased.

In compliance with its said guaranty agreement, dated December 2nd, 1911, said Commonwealth Company duly paid the interest that became due on said thirty-two notes on June 7th, 1912, amounting to \$2,000.00, and also the interest that became due on December 7th, 1912, amounting to \$2,000.00, and also the interest that became due on June 7th, 1913, amounting to \$2,000.00, and the interest that became due on June 7th, 1914, amounting to \$2,000.00 making a total sum of \$10,000.00 paid by it pursuant to its said guaranty agreement dated December 2nd, 1911.

The abstract business in Pierce County continued to slump after December 2nd, 1911, and the Commonwealth Company found before December, 1914, that it could not continue to carry on said guaranty agreement, without great loss to itself, as on said date not only an interest payment of \$2,000.00 was coming due, but also the principal on the first of said thirty-two notes, amounting to \$2,500.00 additional. An effort was made to readjust matters between the defendants and complainants, but without success. This suit was begun upon the failure of such a negotiation.

Frank H. Kelley of Tacoma Washington

John H. Hall of Portland, Ore.

Robert M. Davis of Tacoma, Washington,
Attorneys for Plaintiff.

Bates, Peer & Peterson, of Tacoma Washington
Attorneys for Defendants.

CUSHMAN, District Judge. (After stating facts as above). This general statement is deemed sufficient. Only enough will be added to apply the conclusions reached in order to avoid the saying of more than is necessary, and thereby to escape dictum. The first defense to be considered will be that of the Commonwealth Company. It avers that its guaranty and mortgage securing the payment of a certain part of the principal of the debt of the T. I. & I. Company of Tacoma, and the payment of all the interest on that debt up to 1921, were in violation of the Constitution of the State of Washington, and therefore void. The Constitution of the State of Washington provides:

“Limitations upon issuance of stock.—Corporations shall not issue stock except to bona fide subscribers therefor, or their assignees; nor shall any corporation issue any bond or other obligation for the payment of money, except for money or property received or labor done. The stock of corporations shall not be increased, except in pursuance of a general law, nor shall any law authorize the increase of stock, without the consent of the person or persons holding the larger amount in value of the stock, nor without due notice of the proposed increase having been previously given in such manner as may be prescribed by law. All fictitious increase of stock or indebtedness shall be void.”

As no money or property were received by the Commonwealth Company, nor labor done on its account, it is considered obvious that its guaranty and mortgage securing the debt of the T. I. & I. Company, were given in violation of the foregoing provision. They are therefore both void as in violation of a law rather than *ultra vires* for mere want of power. 10 Cyc. 116.

Plaintiff contends that under the *ejusdem generis* rule the words "or other obligations for payment of money," following in the section of word "bond," should be held to mean a bond-like obligation only. If it be assumed that the guaranty and mortgage are not bond-like obligations, yet, in view of the plainly apparent purpose of the provision to protect the creditors and stockholders of the corporation by forbidding its issuance of promises to pay money unless it receive on account thereof, money, property or labor, no necessity appears for invoking the rule of *ejusdem generis* as an aid to interpret this provision. *Kemmerer vs. St. Louis Blast Furnace Company et al.*, 212 Fed. 63; *In re Progressive Wall Paper Corp.*, 229 Fed. 489; *Farmers' Loan & Trust Co. vs. San Diego St. Car Co.*, 45 Fed. 518, 528; *United States vs. Mescall*, 215 U. S. 26; 91 N. E. 242; *The State of Washington vs. Sam Plastino*, 67 Wash. 374, 375. It was the substance of the baseless promise to pay that was aimed at, and not merely its form. Especially should this be the rule in interpreting constitutional provisions which are always to be construed broadly. If this provision does not forbid a guaranty and mortgage, given to secure the debt of another, then it was needless to forbid the issuance of bonds, for an easy way was left open to avoid the prohibition.

The use of the word "issue" in the section, whereby it is made to read "nor shall any corporation issue any bond or other obligation for the payment of money," etc., may show that a formal written obligation was contemplated, and that the ordinary daily dealings of the corporation in carrying on its business was not aimed at. No other limitation is apparent in this regard.

The fact that the stockholders of the T. I. & I. Company of Tacoma, and the Commonwealth Company, though not entirely identical, yet were practically controlled by the same interests, has been considered. Doubtless the Court would, under certain circumstances, look through the cloak of one corporation to the body of another to prevent the consummation of a fraudulent enterprise, but this is not such a case. Mr. Willoughby, the manager of the T. I. & I. Company of Washington, himself helped to organize the T. I. & I. Company of Tacoma, which was to, and did, immediately take over the property in question. He subscribed for 48 of its 50 shares of capital stock. While it was to take over properties valued at \$100,000.00, its capital stock was placed at \$5,000.00, showing a purpose to minimize the liability on the part of those responsible for the corporation. Whether the T. I. & I. Company of Tacoma was created in order that the good will and advantage of a going concern might be continued to better the security which the selling company held upon the plant and business, or whether it was created to help to deceive the public in the idea that there was real competition in the abstract business, when there was none, or whether it was created for both these purposes, which latter seems the more plausible under the evidence, no assistance is afforded the plaintiff in its contention, for thereby the real plaintiffs helped to create this new corporation, whatever its purpose, and equity is not called upon to strip from the body of the Commonwealth Company the cloak in which it is alleged to be hidden, for the advantage of those who fashioned the cloak suitable to, and

probably in part intended for, that purpose. The fact that Willoughby was indemnified by the Fogg's for his subscription to the capital stock of the T. I. & I. Company of Tacoma, shows that he was acting for and with them. Having knowingly elected to deal in this manner, equity is not now called upon to reform the transaction more to their present liking. The Fogg's and Gove executed a guaranty of the guaranty of the Commonwealth Company in the following language:

“The undersigned, Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, in consideration of the acceptance of the foregoing guaranty and agreements by the said Traders Trust Company of Oregon, and other valuable considerations do hereby agree and guaranty to and with the said Traders Trust Company that the foregoing guaranty and each and every part thereof, is based upon a valuable consideration sufficient in law to bind the Commonwealth Company, and that the same is a valid and subsisting obligation of said Company.”

Having held that the guaranty of the Commonwealth Company was invalid as a direct violation of the constitutional prohibition of the State, above set forth (Article XI, Sec. 6), and not merely *ultra vires*, it follows that the guarantee of these individuals, in contravention of its public policy, is also invalid. Such a prohibition cannot be waived. *Jorguson vs. Apex Gold Mines Company*, 74 Wash. 243; *Smith vs. Alabama Fruit Growers & Wine Association*, 26 So. 232; *Ramsey's Estate vs. Whitebeck*, 56 N. E. 322; *Shane vs. Brandt*, 82 Alt. 551; 32 Cyc. 29; *McMullan vs. Hoffman*, 174 U. S. 639; *Cory vs. Griffen*, 63 N. E. 420.

The defense of the T. I. & I. Company of Tacoma that the suit is premature, in so far as it seeks to foreclose upon the pledged property is concerned, is based upon the following language of the instrument of pledge:

"Time shall be and is of the essence of this agreement and in event of the failure of the first party to pay any of said notes at the time specified in said notes, or to pay any taxes which the first party agrees to pay, and after the continuance of such default for the period of one (1) year, then the whole of said notes shall, at the option of the second party, forthwith and without notice, mature, and the second party shall be entitled forthwith to foreclose said pledge. Defaulted interest shall bear interest at five (5%) per cent per annum from the default until paid.

"PROVIDED, that nothing in this paragraph or in this agreement shall be construed to prevent the second party, at its option, from suing upon any unpaid installment of principal and interest, without waiting for the expiration of one (1) year from the date of default, provided ninety (90) days' notice of such default shall have first been given in writing to the first party or its assigns."

The first of the notes secured by the pledge did not fall due until December 7th, 1915. The failure in the payment of this note would not have continued in effect for one year until the 7th day of next December. This note is in the following form:

"\$2500.00 Tacoma, Wash., December 2d, 1911. •

On or before Dec. 7, 1915 after date, without grace, we promise to pay to the order of The Traders Trust Company, of Oregon, Two thousand five hundred and

no/100 Dollars, in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold Coin, at the rate of five per cent per annum from date hereof, until paid, for value received, Interest to be paid semi-annually at Tacoma, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof we promise to agree to pay in addition to the costs and disbursements provided by statute a reasonable sumDollars, in like Gold Coin for attorney's fees in said suit or action.

Due Dec. 7, 1915.

At Tacoma, Wash., at
Pacific Nat'l Bank.

The Title Insurance and Investment Co. of Tacoma.

No. 1. By

H. H. Gove P."

In the foregoing paragraph of the pledge, if the language "any of said notes at the time specified in said notes" refers to the due date inserted in each note, the suit is, in this respect, premature. If the "time specified" means not only such due date but also the date upon which the payee exercises its option to declare the whole amount of the notes due upon failure to pay the sum due and interest upon any note then another question is presented.

It is considered that the former is the true meaning, and that the suit is premature in this respect. Plaintiff's counsel has contended that the scrivener, in drawing the pledge, made a mistake, saying in his brief:

"It is evident, therefore, that from the clause in question, the scrivener omitted in terms to provide that the right of action should accrue for a failure to make payment of the installments of interest, but that such was the scrivener's mistake and not the intent of the parties. It is the rule of interpretation that where such a seeming inconsistency arises the true intent of the parties must be gathered from the construction of all of the writing involved in the transaction."

If there is a discrepancy between the terms of the notes and those of the pledge, the latter should control in this respect, for the instrument of pledge was specially prepared, all the language of which was worked out for this particular situation, while the notes are on printed forms.

The language used seems to contemplate a definite date to be ascertained by an examination of the face of the note, rather than by reference to the extraneous act of the payee by electing to consider it due after default. It would require very clear language to justify the holding that, while the failure to pay the interest on one of these thirty-two notes would directly precipitate the maturity of the principal, it would indirectly cause the whole \$80,000.00 to become due. The language of the note itself "interest to be paid semi-annually at Tacoma, and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note" is not entirely clear. Does that language mean that the whole amount shall become due on the date the option is exercised, or at the date of failure to pay to which the option shall relate back? However much question there might be under the lan-

guage of the notes alone, considering them in connection with the instrument of pledge the first meaning above indicted is the only one compatible with both, for the language of the instrument of pledge shows that the parties intended that the promisor should have a year's grace after the principal of the note became due, before the payee could elect to mature all the notes, but what benefit would the year's grace be if the payee did not know that the principal of the note had been matured by the payee's election.

The letters written by the plaintiff demanding payment of the past due interest, which are many in number, and continued until November, 1915, show that, up to that time, no such election had been made by the payee to mature the principal of any note.

It therefore follows that, whether the language of the instrument of the pledge "the time specified in said note" refers solely to the due date inserted in the note, or not, the attempt here to foreclose the pledge is premature.

The foregoing goes only to the right to foreclose the pledge upon the abstract plant. The defense of invalidity remains to be considered as affecting the notes given by the T. I. & I. Company of Tacoma. The contention of the defense that the contracts of 1911 were monopolistic and in restraint of trade and competition, affects the validity of both the mortgage or pledge, and the notes of the T. I. & I. Company of Tacoma, as well as of the guaranty and mortgage of the Commonwealth Company, and the guarantee of the individual stockholders of the latter. Article XII, Sec. 22, of the Constitution of the State of Washington provides:

“Monopolies and trusts shall never be allowed in this State, and no incorporated company * * * * in this State shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders or the trustees or assignees of such stockholders, or with any co-partnership or association of persons, or in any manner whatever for the purpose of fixing the price or limiting the production, or regulating the transportation of any product or commodity.” * * * *

In so far as the prohibition of this section is concerned it is self-executing, though legislative action may be necessary to provide penalties for its enforcement, or to authorize recovery on account of its violation. *Manson vs. Hunt*, 82 Wash. 291. In this case it will not be necessary to consider what, if any, changes this constitutional provision made in the common law as to monopoly and restraint of trade and competition. The use of the words “any product or commodity” relieves the court from the consideration of the question as to how necessary or useful a product or commodity an abstract of title is.

It has been contended upon the part of the plaintiff that abstracts of title are not products or commodities, but are rather in the nature of personal services. *State vs. Frick et al.*, 169 S. W. 333.

An abstract of title is a written statement of the substance of those public records affecting the title to particular real property. As the evidence shows, such an abstract is the product of skill and labor upon material made effective by means of a “plant.” It is the written history of title to land. It may be preserved indefi-

nitely and used in accomplishing the sale and transfer of such land. Abstracts in large cities, down to the point where acreage is platted into additions, are often printed by the hundreds from one copy, and kept in stock. Such a one becomes a commodity of value to many persons in the community not interested in the same parcels of land. The abstract is often used as a pledge or security for money borrowed. While it may be difficult to define the exact meaning of the word "commodity," that it is a word of wide scope is shown by a speech of "The Bastard" in "King John." Articles such as written abstracts of title, produced in the manner indicated, are clearly well within the confines of the word "commodity." *Century Dict.* Vol. 2, 1132; 8 Cyc. 339.

When the Commonwealth Company came into these transactions the business of the T. I. & I. Company of Tacoma was in a failing condition, the only consideration to the Commonwealth Company being that it gave it a monopoly by excluding both the T. I. & I. Company of Tacoma, and the T. I. & I. Company of Washington, as well as Smith and Willoughby, from the abstract business in Pierce County. In so far as Smith and Willoughby were concerned, they were not theretofore expressly excluded from competing with the Commonwealth Company. If it be conceded that the agreements not to compete were, so far as the T. I. & I. Company was concerned, incidental to the sale, it cannot be so considered when regarding them as transactions with the Commonwealth Company, because that which one company,—The T. I. & I. Company,—got, the other company,—the Commonwealth Company,—did not get.

It by no means follows that because such an arrangement would be considered a lawful incident to the sale of a profitable business, that it would be so considered in the case of a sale of a business which all recognized as running at a loss. In the first instance, the law, in its indulgence, would attribute only lawful motives, unless compelled to do otherwise, but under the latter circumstances, reason cannot but reject the contention. The foundation of the exception to the rule against any restraint of trade and commerce is that the law never presumes wrong to be done, or a wrongful purpose; that a wrongful purpose, and an act to effect such purpose are necessary to defeat a contract between competent parties; that as long as acts are only such as are reasonably necessary to effect a sale of property, an unlawful purpose will not be imputed, although the effect is, in respect to competition, injurious, but the purpose will be presumed to be merely the disposing of his property by the owner, a right of the highest character, not to be lightly impeded. But, if the seller actually enters into the machinations of the buyer, outside of what is reasonably necessary to the sale of his own, and assists thereby in the stifling of competition, or in forming a monopoly, a purpose to injure the public will be attributed to the seller in spite of his right to sell that which is his own.

What incentive or motive was there to buy a business that was running behind, and lock its plant up for 36 years, if it were not to eliminate all competition. If it cannot be fairly said that the obligee's purpose was to buy, how, without a paradox, can it be said, when they were acting in full accord, that the promisor's purpose

was to sell. Under the circumstances it could not be said that the good-will of the business of the T. I. & I. Company of Tacoma was preserved and passed to the Commonwealth Company, because there was no merger in any way of the business of the two companies. They had been kept entirely separate so far as the public was concerned until this arrangement was made, when the former company abruptly terminated its activities, and, so far as the good-will of its business was concerned, it was simply cast adrift.

Under the contract of 1909, possession was immediately taken of the plant by the buyer, subject to partial control on the part of the seller, and competition for the future was eliminated, but under the agreement of 1911, competition was entirely annihilated, and the delivery of possession of the property postponed for 36 years. The limited span of man's life cannot help but affect his interest and purpose in all his actions. The immediate is of more consequence to him than the remote. Under the first contract it might be plausibly contended that the main purpose was to sell, and that the elimination of competition was incident to the sale, but under the latter transaction it is clear, that, the sale of the property, the transfer of possession, being deferred for thirty-six years, two generations, the main, well nigh the entire purpose, was the elimination of competition, and the transfer of the property was merely incidental. Beyond his grandchildren a man is not hardly concerned for making provision for his descendants. It is contended that this was merely a sale, and that while the seller might have knowledge of defendant's purpose to form a

monopoly, yet it was in no sense the seller's purpose, and that, if the seller's act tended to assist in the buyer's purpose, yet it was only such assistance as was necessarily incident to the making of the sale of its property, which it had a right to do. This contention would be more plausible were it not for the fact that, simultaneously with the sale, Mr. Willoughby, manager of the T. I. & I. Company of Washington, assisted the buyers in securing control, by a five year lease and option to purchase, of the only other competing company, the Wilson Company, by the terms of which the lessor was to remain in possession, that is its plant was not to be operated, that is for a monthly rental which was paid to keep it out of business. By assisting in this transaction, the seller departed from what was reasonably necessary in making a sale of its property, and knowingly assisted the buyer in its purpose to effect a monopoly.

It is true that the services of Willoughby in securing the Wilson lease, was no part of the express consideration for the mortgage of 1909. In this sense it is a collateral matter, but in view of all the evidence it is clear that it was all a part of one transaction, and that it was well understood that complete control, that is monopoly, of the abstract business was to be acquired by securing both the independent plants, with the incidental power to fix and control prices and output. *U. S. vs. Addyston Pipe & Steel Company*, 85 Fed. 271.

This is considered sufficient to render the 1909 contract invalid, without considering the effect of the control in the buying corporation retained by the seller, nor the extent of the latter's interest therein, having a \$90,-

000.00 mortgage on property sold for \$100,000.00 to a corporation with a \$5,000.00 capital stock, upon the interest of the seller, or its responsibility for conduct of the buying corporation.

It may be said that it was reasonable for Smith and Willoughby and the selling corporation to contract not to reenter the abstract business in Pierce County, as a part of the sale. If skilled in their calling all the rest of the world remained open to them, and the public would not be likely to suffer from their enforced idleness, but the locking up, for 36 years, of the valuable abstract plant and the abstract books of the T. I. & I. Company of Tacoma, whose only possible use was in the abstract business in Pierce County, deprives the country of a valuable industrial agency in which the public has an undoubted interest. This qualification is recognized by the Supreme Court in *Oregon Steam Navigation Company vs. Winsor*, 87 U. S. 64.

In case of bad market conditions the closing, by agreement, of a plant for a limited time, that is such time as such conditions might reasonably be expected to continue, might not be unlawful, but 36 years is far in excess of any such reasonable time. In *Olin vs. Gilmore*, 25 Fed. 562, where the agreed term was 5 years and the articles not to be manufactured were two kinds of hinges, the agreement was held to be invalid.

Prior to the agreement of December, 1911, in July of that year, one of the Foggs wrote to Willoughby in part as follows:

"The abstract business is now so poor that some new plan must be made, as there is not enough business to

even pay the running expenses of the two plants, and in addition to that, the new man is coming into active competition and must be headed off before he has a chance to build up a good plant. If you will give us your share of help, we will still try to pull the thing out OK, as almost any revenue derived will be more than could be had by fighting him and each other too. After considering a good many plans, this one seems to be the best.

“That is, to increase the capital stock of our company to four hundred thousand dollars, give you \$80,000 and Wilson \$38,000, preferred stock at 5%, in exchange for your plants, then operate only our plant, and as soon as the amount of work increases any, to cut the rate to seventy-five cents and later to fifty cents, if necessary to keep a clear field. This plant could easily do several times the total abstract business to be done, and we could make more money for us all by operating one plant at reduced rates, than to keep the rates up and let the new man build up a plant out of his profits, and I am sure that low abstract rates will keep out competition better than several companies at higher rates would do. At a dollar, the new man would make a little profit on each order, but at seventy-five cents he would lose a little on each order, and no one outside of ourselves can make abstracts at less than a dollar and make a cent profit. We could do it because our plant is so complete and we have such a large amount of stock on hand.”

While the proposition made in this letter was not accomplished in its entirety, it was not rejected on account of the proposition to crush the new competitor by cutting prices. In fact a little later Mr. Willoughby writes Mr. Fogg as follows:

“Your letter of August Third relative to the abstract situation at Tacoma has been received.

"We understand the condition of the abstract business in Tacoma and are ready to give our assistance to any proposition that will relieve the situation, provided our interests are fully protected. Would rather take the plant back and operate it than to go into a proposition whereby we would be a minority stockholder and therefore have nothing to say in the management of the company."

Later in December the arrangement now in question in this suit, was made. It relieved the defendants of the expense of maintaining two abstract companies, and left them free to suppress this new competitor, as so frankly proposed by Mr. Fogg in his letter to Mr. Willoughby. Although the cutting of prices generally would be of benefit to the public, yet cut-throat competition such as that proposed, and evidently acceded to, for its own benefit, by the plaintiff, the object of which was to eliminate a competitor by selling without regard to a fair profit, for the sole and express purpose of crushing him, to recoup later from the public, is itself unfair competition. *People vs. Dwyer*, 145 N. Y. Supp. 748, affirmed 150 N. Y. App. Div., 542, further affirmed 215 N. Y. 48; *U. S. vs. Great Lakes Towing Company*, 217 Fed. 656, 659, 661; *Report of Comm. of Corp.*, March, 1915—see *Trust Laws and Unfair Competition*, p. 305 et seq., 463 et seq., 479 et seq.

For all of the foregoing reasons it is considered that both the contract of 1909, and those of 1911, are invalid as being unduly and unreasonably in restraint of trade and competition.

If, as has been held under the Sherman Anti-Trust Law, there may be lawfully a reasonable restraint of

trade and commerce, the converse would appear to be that such right carried with it a correlated duty that such restraint should not be unreasonably unrestrained. Such, it is considered, would be a campaign of price cutting such as impliedly agreed to herein, for such would be well calculated in itself, in the end, to unduly restrain trade by driving the men of lesser financial resources, though of equal skill and efficiency, from the field, and, through fear, keeping them from entering it.

Having reached this conclusion, it follows, the pledge of the abstract plant becomes incident to the notes now held to be invalid. The pledge is therefore likewise held to be invalid.

In both the complaint of the plaintiff and the answer of the defendant there is a prayer for general relief in addition to the specific prayer made by each. The Court is warranted in treating such a prayer as for alternative relief and decreeing what equity requires, though it be the specific prayer of neither party.

Ordinarily a court of equity would leave the parties to such invalid contracts in the place where they had placed themselves, and would offer no assistance to either.

16 Cyc. 144 et seq.

16 Cyc. 149 et seq.

In the present case it is to the interest of the public that the abstract plant, at present locked up in such a way as to be inaccessible without the consent of both the plaintiff and the defendant, Commonwealth Company, be restored to active competition. It therefore appears that if the Court adheres to the above rule it will be

assisting in carrying out the monopoly which the parties created. For this reason it is concluded that, in the interest of the public, in the present case this rule should not be followed, but that the abstract plant be restored to the plaintiff. (16 Cyc. 149 notes 7 and 10.) This may be effected by enjoining the trustee holding the second key to the vault in which the abstract plant is kept, from carrying out the illegal trust imposed upon him by the agreement in question. This leaves the plant in the plaintiff's sole custody. The guaranty agreement of the Commonwealth Company contained the following provision:

"The Commonwealth Title Trust Company for the same condition does hereby agree that so long as the abstract plant heretofore and now the property of the Title Insurance & Investment of Tacoma, is held as security for the payment of said indebtedness or any part thereof, it will correctly abstract or cause to be abstracted, all deeds, mortgages or other conveyances, mechanic's liens, and all miscellaneous records, whether herein specifically mentioned or not, affecting the title to real property in Pierce County, Washington, in the same manner and with the same accuracy and dispatch that the same work has heretofore been performed by the Commonwealth Title Trust Company, and cause the same to be arranged according to fee numbers or other system, satisfactory to the Traders Trust Company of Oregon, or its assigns, and cause the same to be bound and properly identified in the customary manner, boxed, wrapped and shipped to the trustees chosen by the Title Insurance & Investment Company of Tacoma, and the Traders Trust Company of Oregon, in accordance with the terms of a certain agreement of pledge made between the Title

Insurance & Investment Company of Tacoma, first party, and the Traders Trust Company of Oregon, second party, of even date herewith, at Portland, Oregon.

PROVIDED, HOWEVER, in consideration of this covenant on the part of the individual guarantors, the said Traders Trust Company of Oregon, its successors and assigns, does hereby waive the right to demand such "take-offs" so long as each and every of the payments of the interest and the principal is made at the times specified in said notes and each of them, or within one year thereafter, and so long as each and every of the covenants on the part of the Title Insurance & Trust Company of Tacoma, in said agreement of pledge of even date herewith, are kept and performed at the times therein agreed; in the event of such default, and its continuance for one year, however, the undersigned agrees that they will forthwith furnish or cause to be furnished to the Traders Trust Company of Oregon, its successors and assigns, all the "take-offs" necessary to complete said plant in the manner hereinbefore specified and thereafter as long as said plant or any part thereof is held as security for such indebtedness, they will keep said plant down to date in such manner."

These "take-offs" would cost \$20,000.00, unless done by the Commonwealth Company, in which case they would cost \$750.00, as in making the "take-offs" for their own plant as it would only be necessary to manifold the work in typewriting. A considerable number of these "take-offs" have been made by the Commonwealth Company, but have not been delivered as agreed. The first installment of interest in default fell due in December, 1914. Suit was begun in February, 1916. The constitutional provision prohibiting the issuance by a corporation of an obligation for the payment of money, unless

for money or property received, or labor done, does not affect this provision of the Commonwealth's guaranty agreement, for the undertaking is not for the payment of money.

Upon first considering this question I was of the opinion that the interest of the public in the restoration of this impounded abstract plant to competition, together with the disparity in the injury wrought the plaintiff by denying the delivery of the "take-offs" as compared with the cost to the plaintiff in making them, was sufficient to justify a decree of their delivery to the plaintiff company, but, upon further consideration, I have concluded that the general rule should be adhered to in this particular, and that equity will leave the parties in the situation in which they have placed themselves. At the time of the arrangement made in 1909 the Commonwealth Company, without any consideration of value to that Company, transferred to the T. I. & I. Company of Tacoma, a considerable number of valuable abstract records, of which, I understand, the Commonwealth Company had two sets. These records were subjected to the mortgage to the T. I. & I. Company of Washington and are, at present, a part of the locked up plant. Under any principle of equity if the "take-offs" were decreed to be delivered by the Commonwealth Company to the plaintiff, the same rule would require the return to the Commonwealth Company of these records parted with by it in 1909, and which are at present a part of the impounded plant. It is therefore considered that in both respects the parties will be left in their present position, such last mentioned records remaining with the remainder of the plant in plaintiff's possession.

Decree will be prepared to embody the foregoing conclusions, neither party to recover cost.

Filed Sept. 28, 1916.

STIPULATION FOR SUBSTITUTION OF PARTY.

Franklin Fogg, one of the defendants in the above entitled cause, having died since the rendition of the final decree herein, and Alva Fogg, his widow, having been appointed as the administratrix of his estate and having qualified as such administratrix, it is stipulated that the said administratrix be substituted for the said decedent as one of the defendants herein.

Dated at Tacoma this 6th day of December, 1916.

FRANK H. KELLEY,

Solicitor for the plaintiff.

CHARLES O. BATES,

NEWTON H. PEER,

CHARLES T. PETERSON,

Solicitors for the defendants.

ORDER.

On reading the foregoing stipulation it is ordered that Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, be and she hereby is substituted as a party defendant in the above entitled cause.

EDWARD E. CUSHMAN,

Judge.

PETITION FOR APPEAL.

Now comes Lumbermen's Trust Company, Trustee, plaintiff in the above entitled cause and, considering itself aggrieved by the final order, judgment and decree of this Court made and entered as of record on October 9, 1916, hereby does appeal from said final order, judgment and decree and from each and every part thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and prays that its said appeal be allowed.

The plaintiff presents herewith its Assignments of Error, and its Bond on Appeal in the sum of two hundred fifty (\$250.00) dollars, with good and sufficient security and prays that said sum be fixed as the amount of its said bond on appeal and that its said bond be approved. The plaintiff further prays that transcript of the record, proceedings and papers upon which the said final order, judgment and decree of this Court were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that citation may issue to Title Insurance & Investment Company, Commonwealth Title Trust Company, Horace Fogg, Herbert H. Gove and Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, defendants, in the above entitled cause, to be and appear in said Circuit Court of Appeals on a day certain, as by law provided.

FRANK H. KELLEY,
JOHN H. HALL,
ROBERT M. DAVIS,

Solicitors for Plaintiff.

Service of the within and foregoing, petition for appeal, by receipt of a copy thereof, hereby is acknowledged at Tacoma, this 6th day of December, 1916, and notice of hearing said petition is waived.

BATES, PEER & PETERSON,
Solicitors for Defendants.

ASSIGNMENTS OF ERROR.

Now comes the plaintiff and says that in the record and proceedings of said court and in the final decree therein, there is manifest error, and for error the plaintiff assigns as follows:

I.

The court below erred in holding the agreements of 1909 between the Title Insurance & Investment Company of Tacoma and the Title Insurance & Investment Company of Washington void as in unreasonable restraint of trade and competition.

II.

The court below erred in holding the contracts of 1911 between the Title Insurance & Investment Company of Tacoma and the Traders Trust Company void as in unreasonable restraint of trade and competition.

III.

The court below erred in holding the agreement of Smith and Willoughby and the Title Insurance & Investment Company of Tacoma not to transact an abstract or title insurance business in Pierce County,

Washington, during the life of the agreements between the Title Insurance & Investment Company of Tacoma, the Commonwealth Title Trust Company and The Traders Trust Company, to be for the same consideration and a part of the agreements of 1911 between these parties, and void as in unreasonable restraint of trade.

IV.

The court below erred in holding the contract of 1911 between the Title Insurance & Investment Company of Tacoma and the Traders Trust Company void as in contravention of Art. XII, Sec. 22 of the Constitution of the State of Washington.

V.

The court below erred in holding the agreement of 1911 between the Commonwealth Title Trust Company and the Traders Trust Company, and the mortgage given to secure the obligation of that agreement, void as in contravention of Art. XII, Sec. 6 of the Constitution of the State of Washington.

VI.

The court below erred in holding the individual agreements of the Foggs and Gove, warranting and guaranteeing the validity, binding force and effect of the agreement of the Commonwealth Title Trust Company, were void and unenforceable.

VII.

The court below erred in holding the suit to be premature.

VIII.

The court below erred in dismissing the plaintiff's complaint and entering a decree for the defendants.

IX.

The court below erred in denying to the plaintiff the relief prayed for in the complaint.

Wherefore the plaintiff prays that said decree may be reversed and that said court may be directed to enter a decree in accordance with the prayer of the complaint.

FRANK H. KELLEY,
JOHN H. HALL,
ROBERT M. DAVIS,
Solicitors for Plaintiff.

Copy of the within Assignments of Error received
this 6th day of December, 1916.

BATES, PEER & PETERSON,
Solicitors for Defendants.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That the Lumbermen's Trust Company, a corporation, of Portland, Oregon, as principal, and New Amsterdam Casualty Company, as surety, are held and firmly bound unto Title Insurance & Investment Company, the Commonwealth Title Trust Company, Horace Fogg, Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, Fred Fogg and Herbert H. Gove, in the penal sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which well and truly to be made to the said obligees, we hereby bind ourselves, our successors and assigns, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed, sealed and dated at Portland, Oregon, this 21st day of October, 1916.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT

WHEREAS, the above bounden Lumbermen's Trust Company has appealed to the United States Circuit Court of Appeals for the Ninth Judicial District, from the order and final decree of the District Court of the United States for the Western District of Washington, denying to the said Lumbermen's Trust Company the relief prayed for in its bill of complaint in this cause, which final order and decree was made and entered of record as of October 9, 1916;

NOW, THEREFORE, if the said Lumbermen's Trust Company shall prosecute its said appeal to effect and answer all costs and damages that may be awarded

against it on said appeal, if it fail to make its said appeal good, then this obligation is to be null and void; otherwise to be and remain in full force and virtue.

IN WITNESS WHEREOF, the above bounden principal has caused this instrument to be executed and its corporate seal hereto annexed by F. A. Freeman, Vice-President, and Frank W. Camp, Secretary, officers of the said corporation duly authorized so to do, and the above bounden surety has caused its name and corporate seal to be hereto affixed by W. J. Clemens, Attorney-in-fact, its officers and agents so to do duly authorized, both at Portland, Oregon, the day and year above written.

LUMBERMEN'S TRUST COMPANY,
a corporation,

By F. A. FREEMAN,
(Corporate Seal) Its Vice-President.

By F. W. CAMP,
Its Secretary.

NEW AMSTERDAM CASUALTY COMPANY,

By W. J. CLEMENS,
Attorney-in-fact.
(Corporate Seal)

Service of the within and foregoing bond on appeal, by receipt of a copy thereof, hereby is acknowledged at Tacoma, this 6th day of December, 1916.

BATES, PEER & PETERSON,
Attorneys for Appellees.

**ORDER GRANTING APPEAL AND FIXING
AMOUNT OF BOND ON APPEAL.**

The petitioner, Lumbermen's Trust Company, Trustee, plaintiff in the above entitled cause, having heretofore filed its petition for appeal and therewith assignments of error together with its bond in the penal sum of two hundred fifty (\$250.00) dollars conditioned as by law required, and having further given due notice to the defendants above named, of its said petition and its said bond and of the time for presenting the same.

IT IS ORDERED that the said appeal be and the same hereby is allowed to the said petitioner, and the amount of its bond on appeal hereby is fixed as of the sum of two hundred fifty (\$250.00) dollars, and the petitioner's said bond on appeal in said penal sum, with surety therefore, hereby is approved; and

IT FURTHER IS ORDERED that citation issue to the said defendants and each of them, viz.: to Title Insurance & Investment Company, Commonwealth Title Trust Company, Horace Fogg, Fred Fogg, Herbert A. Gove and Alva Fogg, administratrix of the estate of Franklin Fogg, deceased, to be and appear in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, as by law provided.

Done in open court at Tacoma this 6th day of December, 1916.

Exception allowed to the defendants.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States for
the Western District of Washington, Holding
Terms at Tacoma.

Service of the within and foregoing order granting appeal and fixing and approving the bond on appeal by receipt of a copy thereof, hereby is acknowledged at Tacoma this 29th day of December, 1916.

CHARLES O. BATES, of
Solicitors for Defendants.

— IN THE —

District Court of the United States

— FOR THE —

Western District of Washington,
Southern Division.

LUMBERMEN'S TRUST COMPANY,
a corporation, Trustee,

Plaintiff,

vs.

TITLE INSURANCE & INVESTMENT COM-
PANY OF TACOMA, a corporation, COM-
MONWEALTH TITLE TRUST COMPANY,
a corporation, HORACE FOGG, FRANK-
LIN FOGG, FRED S. FOGG and HERBERT
H. GOVE,

Defendants.

NO. 54 E.

JUDGMENT
AND DECREE

This cause having heretofore, and on the 15th and 16th days of June, A. D. 1916, been duly tried and submitted to the Court upon the pleadings and the evidence, the plaintiffs appearing by Frank H. Kelley, Davis & Neal and John Hall, its attorneys, and the defendants appearing by Bates, Peer and Peterson, their attorneys, and the Court having heard the evidence, and the argument of counsel both orally and upon written briefs, and having taken the cause under advisement until the 28th day of September, A. D. 1916, when the Court being fully advised in the premises filed its written opinion in this case;

And now on this day this cause comes on further to be heard upon the motion of Bates, Peer & Peterson, attorneys for defendants, for a judgment and decree in accordance with said written opinion heretofore filed herein, and the Court being fully advised in the premises, and it appearing to the Court that said motion should be sustained;

It is by virtue of the premises, and the Findings and Conclusions in said written opinion filed as aforesaid, by the Court ORDERED, ADJUDGED and DECREED,

I.

The plaintiff, Lumbermen's Trust Company, is a corporation duly organized and existing under the laws of the State of Oregon, having a principal place of business in Portland, Multnomah County, therein, and is a citizen of the said State, and is authorized and empowered by its charter and articles of association to act as a Trustee. The said plaintiff corporation by reorganization and change of name, is the successor to and endowed with all the rights and powers and responsibilities of the Lumbermen's Trust and Savings Bank, a corporation organized and existing under the laws of the State of Oregon, having its principal place of business in Portland, Multnomah County, therein, and a citizen of said State.

II.

The defendant Title Insurance & Investment Company of Tacoma, is a corporation organized and existing under the laws of the State of Washington, having

a principal place of business at Tacoma, Pierce County, therein, and is a citizen of said State, and is authorized by its Articles of Incorporation to engage in the manufacture and sale of all kinds of abstracts of title of real estate, abstract books and other records of the transfer of title of real estate, and to engage in the purchase and sale thereof, and generally to transact any and all business incident thereto.

III.

The defendant Commonwealth Title Trust Company is a corporation organized and existing under the laws of the State of Washington, having a principal place of business at Tacoma, Pierce County, therein, and is a citizen of said State, and is authorized by its Articles of Association to acquire the good will, rights, properties and assets of all kinds of any person, firm or corporation dealing in abstracts of title, or owning an abstract of title plant, and to acquire any and all abstract books, files, records and all property and matters pertaining thereto.

IV.

The defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, each of them, is a citizen of the State of Washington, residing at Tacoma, Pierce County, in said State.

V.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that at all times mentioned in the complaint, and in the answers in this case, one A. D. Wilmoughby and O. M. Smith and Ella M. Smith, his wife,

were officers and sole stockholders of the Traders Trust Company, of Oregon, a corporation mentioned in the pleadings.

That at all times mentioned in the pleadings A. D. Willoughby and Marion Willoughby, his wife, were officers and owners and holders of all of the stock of the Marion Investment Company, a corporation mentioned and referred to in the pleadings.

VI.

That the promissory notes executed and delivered on the 2nd day of December, 1911, by defendant Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon, a corporation duly organized and existing under the laws of the State of Oregon, having its principal place of business at Portland, in said State, and a citizen of said State, in the aggregate sum of Eighty Thousand Dollars, said notes being thirty-two in number, each of said notes being for the principal sum of \$2500.00, as set forth and described in the fifth paragraph of the complaint, together with the mortgage and pledge of personal property given to secure said notes, a copy of which is annexed and attached to the complaint herein marked Exhibit "A," and which said notes and mortgage given to secure the same was by the said Traders Trust Company of Oregon assigned to the Lumbermen's Trust & Savings Bank of Oregon, in trust for the benefit of the said Marion Investment Company and O. M. Smith and Ella M. Smith, his wife, and each of them are invalid as being unduly and unreasonably in restraint of trade

and competition, and as being monopolistic and in contravention of Article XII, Section 22, of the Constitution of the State of Washington, and as being entered into for the purpose of forming a monopoly in the abstract business in Pierce County, Washington, and restraining trade and competition in such business in said County, and in contravention of the public policy of the State of Washington, and the said notes and the said mortgage given to secure the same be, and they are hereby cancelled, annulled and held for naught.

VII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the contract of guaranty signed on the 2nd day of December, 1911, by the defendant Commonwealth Title Trust Company, and the guaranty of defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, attached thereto and delivered to the Traders Trust Company of Oregon, whereby the said defendant corporation Commonwealth Title Trust Company did guarantee the payment of the first seven of the notes made, executed and delivered by the Title Insurance & Investment Company of Tacoma, as hereinbefore set forth, in accordance with the terms and conditions of said notes, and further guaranteed the payment of the interest down to and including the interest maturing December 7th, 1921, of each and all of the thirty-two notes in accordance with the terms thereof, and whereby the said defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, guaranteed and agreed that the guaranty and agreement of the Commonwealth Title Trust Company, and

each and every part thereof was based upon a valuable consideration sufficient in law to bind the Commonwealth Title Trust Company, and that the same is a valid and subsisting obligation of said company, a copy of which said guaranty in writing is attached to the complaint and made a part thereof, marked "Exhibit B," together with the mortgage executed by the defendant Commonwealth Title Trust Company to the Traders Trust Company, of Oregon, on the 2nd day of December, 1911, to secure said contract of guaranty covering the following described property situate in Pierce County, State of Washington, to-wit:

Beginning at a point on the Northerly side of South 10th Street, City of Tacoma, distant 80.04 feet Westerly of the point of intersection of the Northerly line of South 10th Street with the Westerly line of "A" Street in said City of Tacoma, thence Northerly and parallel with the Westerly line of "A" street, 125 feet; thence at right angles Westerly 19.69 feet; thence at right angles Southerly and parallel with the Westerly line of "A" street 125 feet to the Northerly line of said South 10th Street; thence at right angles Easterly to the place of beginning.

And also a right-of-way in, over and along the following described land situated in the said City of Tacoma, to-wit:

Beginning at a point on the Westerly line of "A" Street formed by the intersection of said Westerly line of "A" street with the Southerly line of Lot 7, Block 902, City of Tacoma; thence Westerly along the Southerly line of Lot 7, 120 feet to the Easterly line of the

alley between said "A" street and Pacific Avenue; thence at right angles Southerly 10 feet; thence at right angles Easterly 120 feet to the Westerly line of "A" street; thence at right angles Northerly 10 feet to the place of beginning; subject, nevertheless, and reserving to the owners of property adjoining the perpetual right-of-way through and along so much of said land last described in conformity with one certain deed from William C. Bardsley and wife, dated April 15th, 1901, and recorded in Book 166, at page 396,

a copy of which said mortgage is attached to the complaint marked Exhibit "C," and made a part thereof, which said mortgage was filed for record in the office of the Auditor of Pierce County, Washington, on December 4th, 1911, at 1:21 P. M., and recorded in Book 178 at page 194 of the Mortgage Records of said County, which said contract of guaranty and the mortgage given to secure the same were assigned and transferred by the Traders Trust Company of Oregon to the plaintiff herein, and each of said instruments, and each and every part thereof, are illegal and void, as being in direct violation of the constitutional prohibition of Article XII, Section 6, of the Constitution of the State of Washington, the said defendant Commonwealth Title Trust Company receiving no money, property or labor done for it in consideration of the execution of said contract of guaranty, and said contract of guaranty constituted a fictitious indebtedness of said Commonwealth Title Trust Co., and as being unduly and unreasonably in restraint of trade and competition and monopolistic, and as being entered into for the purpose of forming a mo-

nopoly in the abstract business in Pierce County, Washington, and restraining trade and competition in such business in said County, and as being in violation of Article XII, Section 22, of the Constitution of the State of Washington, and in contravention of its public policy, and the said contract of guaranty of the Commonwealth Title Trust Company and of the defendants Horace Fogg, Franklin Fogg, Fred S. Fogg and Herbert H. Gove, and each and every part thereof, and the mortgage given to secure the same be, and the same are hereby decreed to be cancelled, satisfied of record, illegal, unenforceable and void.

VIII.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the mortgage executed by the defendant Title Insurance & Investment Company of Tacoma to the Title Insurance & Investment Company of Washington, on the 7th day of December, 1909, which said mortgage was recorded in the office of the Auditor of Pierce County, Washington, on the 9th day of December, 1909, at 3:07 P. M., at page 429 of Volume 23, of the Records of Chattel Mortgages of said Pierce County, and also filed as a Chattel Mortgage in the office of the Auditor of Pierce County, Washington, fee No. 305,259, together with the notes for Ninety Thousand Dollars, set forth and described in said mortgage, which said mortgage is attached to the answer of the defendant Commonwealth Title Trust Company marked Exhibit 1, be, and each of them are, and were at the time of their execution, and ever since have been, illegal and

void, as being unduly and unreasonably in restraint of trade, and as being monopolistic and in contravention of Article XII, Section 22, of the Constitution of the State of Washington, and as being entered into for the purpose of forming a monopoly in the abstract business in Pierce County, Washington, and restraining trade and competition in such business in said County, and as contrary to the public policy of the State of Washington.

IX.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the agreement entered into by A. D. Willoughby and O. M. Smith, on the 2nd day of December, 1911, whereby the said A. D. Willoughby and O. M. Smith agreed not to enter directly or indirectly in the abstract business in Pierce County, Washington, be cancelled, annulled and set aside, as being in restraint of trade and competition.

X.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the abstract plant described in the mortgage executed by the defendant Title Insurance & Investment Company of Tacoma to the Traders Trust Company of Oregon, which said mortgage is attached to the complaint herein marked "Exhibit A," dated December 4th, 1911, and which plant is now stored in the City of Portland, be, and the same is hereby decreed to be the property of the plaintiff, free and clear of any claim or demands of the defendants, or either of them.

XI.

IT IS FURTHER ORDERED, ADJUDGED
and DECREED that neither party recover costs here-
in.

Done in open Court this 9th day of October, A. D.
1916.

EDWARD E. CUSHMAN,
Judge.

312.

